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REPORTS

OF

CASES IN LAW AND EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT

MACON, JUNE TERM, ATLANTA, AUGUST TERM, MILLEDGEVILLE
AND ATHENS NOVEMBER TERMS, 1858; AND SAVANNAH, JANUARY TERM, 1859.

VOLUME XXVI.

B. Y. MARTIN, REPORTER.

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JUDGES OF THE SUPREME COURT.

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Hon. CHARLES J. McDONALD, Marietta.
Hon. HENRY L. BENNING, Columbus.

B. Y. MARTIN, Reporter, Columbus.
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JUDGES OF THE SUPERIOR COURTS,

PRESIDING DURING THE PERIOD OF THESE REPORTS.

Brunswick District,	Hon.	A. E. Cochran, Brunswick.
Blue Ridge District,	"	George D. Rice.
Chattahoochee District,	"	E. H. Worrill, Talbotton.
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Northern District,	"	James Thomas, Beulah P. O.
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South Western District,	"	Alex. A. Allen, Bainbridge.
Tallapoosa District,	"	Dennis F. Hammond, Newnan.
Western District,	"	N. L. Hutchins, Lawrenceville.

ERRATA.

Page 485, 9th line from the foot, instead of Judge **Alexander**, read Judge **Love**.

Page 611, Judge **Lumpkin's** name should be omitted in the heading, he having been absent from the Savannah January Term, 1859, in consequence of the ill health of his family.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT MACON,

JUNE TERM, 1858.

Present—JOSEPH H LUMPKIN,
CHARLES. J. McDONALD,
HENRY L. BENNING, } Judges.

Alexander J. Robison, plaintiff in error, vs. Erasmus Beall, survivor, &c., defendant in error.

[1.] That the bills of a bank are below par does not make their circulation illegal.

[2.] Though the holder of the bills of a bank obtains them at a discount, he may collect them in full.

[3.] It is no defence to the parties to a note, when sued by the holder, that he has made a champertous agreement in reference to the note, with the attorney bringing the suit.

[4.] The Planters and Mechanics Bank of Columbus had the power to purchase and again to sell its own stock.

[5.] That a transfer of stock in the Planters and Mechanics bank of Columbus, was made after the failure of the bank, did not render the transfer void, and, therefore, did not prevent the transferee from becoming a stockholder, and as such, being liable under the 4th section of the bank's charter.

[6.] That the transfer of the stock of this bank, is made at a time when the bank is doing business, and is able to pay its debts, and made to a solvent person, does not, *per se*, relieve the stockholder making the transfer, from the liability created by the 11th section of the bank's charter.

[7.] The liability of the stockholders of the Planters and Mechanics bank of Columbus, expired, with the expiration of the charter of the bank.

Debt in Muscogee Superior Court. Tried before Judge Worrill, May Term, 1858.

This was an action brought by defendant in error against Alexander J. Robison.

The declaration alleges that Robison was a stockholder in the "Planters and Mechanics Bank of Columbus" to the amount of 575 shares of stock, rated at $100 per share. The charter of the bank provided "that the persons and property of the stockholders shall be pledged and held bound in proportion to the amount of shares and the value thereof, that each individual or company may hold in said bank for the ultimate redemption of the bills or notes issued by said bank in the same manner as in common action of debt, and no stockholder shall be relieved from such liability, by sale of his stock, until he shall have caused to have been given sixty days' notice in some public gazette of this State." The plaintiff alledged that he was the holder of bills of the bank to the amount of $500, on which he had obtained judgment against Robert B. Alexander, assignee, appointed by the Legislature to take charge of and wind up the affairs of said bank, on which judgment execution had been issued and a return of *nulla bona* made thereon by the Sheriff. Plaintiff sought in this action to make the defendant, as a stockholder in said bank, liable for the payment of said bills.

The defendant filed a number of pleas; among others, the statute of limitations, the forfeiture of the charter of the bank, and the expiration of the charter by its own limitation, &c.

The plaintiff demurred to answering original interrogatories served upon him in accordance with the statute, which demurrer was sustained, and the defendant excepted.

Plaintiff proved that he was the holder of $500 of the bills of the bank, and that he had sued said bank to insolvency on the same. The defendant objected to the execution of plaintiff against the bank being read in evidence, because no term intervened between rendition of verdict and judgment, issuing of execution and return of *nulla bona* thereon; which the Court overruled and defendant excepted.

Plaintiff proved the circulation of the bank on the 7th February, 1843, to be $231,300, defendant objected to its going in evidence to the jury, which was overruled and defendant excepted.

Plaintiff proved defendant's ownership of stock by the transfer book.

Defendant objected to the transfer from Ragan, Cashier of the bank, to defendant being read in evidence, which was overruled and defendant excepted.

Defendant objected to other transfers going in evidence, made by Smith, as attorney for Redd and Morgan, because there was nothing to prove that Smith was their attorney in fact, which was overruled and defendant excepted.

Plaintiff closed his case and defendant moved a nonsuit because the plaintiff had not proved the circulation of the bank at the time of the trial, or at the time the doors of the bank were closed, when he had alledged the circulation at these times, which motion was overruled and defendant excepted.

Defendant opened his case, and read the jury the testimony of A. B. Ragan, under agreement of counsel, to-wit: "He was one of the first directors of the Planters and Mechanics Bank, and who acted, for a while, as cashier, proving by him that a portion of the stockholders met in 1837 to organize the bank; a few of them paid in specie, some in bills of the State Bank, and others in indorsed notes. An arrangement was made, through a committee, with the cashier of the Bank of Columbus, that said cashier would give them a specie certificate for the purpose of organizing. Some time subsequent to May, 1837, the president and several of the directors—witness among them—went to the cashier of the Bank of Columbus and asked for the specie; he showed them certain kegs and boxes, which he stated contained $230,000 in specie, and stated that he procured a specie certificate from the Insurance Bank for the balance, to make up the sum of $250,000. The kegs and boxes were not examined to see whether they contained specie, but the statement of the cashier to that effect was relied on. His statement was, without inquiry, also relied on with reference to the Insurance Bank certificate.—The directors held a meeting and determined to do no business, but passed an order to loan out the money to the stockholders, if they wanted it. The stockholders, generally, borrowed it, receiving checks on the Bank of Columbus. Witness never heard of any demanding specie, except one person, and the bank refused to pay him specie. In February, 1838, the annual election for directors took place, and an order was passed that the stockholders who had borrowed of the bank, should reduce their debt by paying in one half. Those who complied did so by paying in, mostly, the bills of suspended banks. Not more than $800 or $1000 dollars of specie was paid in. The new stockholders put in their notes in place of those from whom they purchased. The directors then ordered $250,000 of bills to be issued, the larger portion of which were put in circulation—witness could not tell how much."

Defendant then proposed, under the agreement of counsel, to read the statement of Mathew Robertson. The plaintiff objected to the following part of said statement going to the jury, to-wit:

"The condition and credit of the bank was good until the spring of 1841, when its bills were at from 5 to 10 per cent. discount; and by the spring of 1843 they were only worth 5 or 10 cents in the dollar. His opinion was that, all the time the bank was solvent, and that even when it closed doors, if properly managed, the assets were ample to pay all its debts. Does not remember at what particular time the assets ceased to circulate as money. Thinks Adkins owned the bills sued on in 1842, and may be in latter part of 1841. One of those years thinks Adkins told him he was buying them at a discount, and it was his opinion that Bailey, Wiley & Dougherty did not own them until after the forfeiture of the charter. He was all the time in the bank and does not remember that any one of the billholders presented their bills or enquired what they were likely to get for them. Thinks Bailey and Wiley could have done so if they had owned them; never heard of Wm. Dougherty being a creditor of the bank till long since some of these suits have been commenced, and thinks if he had been he would have sued much sooner than he did. At the time of the assignment the bank was winding up, and if let alone thinks it would have paid all its debts It had the means and disposition to do it. The assignment was generally known and approved, was known, he thinks, to most of the billholders, and he never heard an objection or intimation of disapproval from one of them." The Court sustained the objection and the defendant excepted.

The defendant read the balance of Robertson's statement to the jury which proved bills of the bank unredeemed and in circulation when the bank closed its doors, 26th May, 1843, to be $226,000.

Transfers of stock on the book witnessed by me were made by the parties whose names are signed as transferring the same.

A large portion of the bills left and paid out in circulation when the bank closed its doors were circulated by the Bank of Columbus upon the faith of a bond given to said bank by some of the stockholders and directors of the Planters and Mechanics Bank.

Defendant then introduced John Banks, who stated, among other things, that he refused to unite with the directors in making the return to the Governor under oath, because he was not satisfied that the specie was at the control of the bank, and gave various reasons why he was not satisfied of the fact. Has been released as director and stockholder from liability to the Bank of Columbus, from the stock he got of Terry, of Mississippi; was released from the stock he got originally. Has been released by Mr. Dougherty in all the cases he represented.

Defendant then asked the witness what amount of bills he had on hand after the bank made its assignment, and after the forfeiture of its charter, and whether he had not paid said bills out for a plantation in Stewart county. The question was objected to by plaintiff, and objection sustained and the defendant excepted.

Defendant then read the return of the President, Bailey, and Directors, to the Governor, and the affidavit that the bank had been organized by strict compliance with the terms of the charter.

Defendant proposed to read the deed of assignment to Alexander, and the judgment of forfeiture of the charter of the bank, which was refused by the Court, and defendant excepted.

Defendant proposed to read in evidence the plaintiff's answer to the eleventh interrogatory propounded to him by defendant, which was refused, and defendant excepted.

The answer to said interrogatory discovered the fact that Mr. Dougherty took the bills of the plaintiff for collection, paying all expenses of litigation, and receiving half the recovery for his compensation.

Bills to large amounts were proven to be in possession of Mr. Dougherty, belonging to Bailey and Bonner, former Directors, a large amount in the hands or control of Mr. Mustian, which he said the bank owed him nothing upon; a large amount to belong to the Bank of Columbus, a large amount in the hands of the assignee of the Planters and Mechanics Bank, and an amount in the hands of Hines Holt, a former

Director, and $1,530 to be in the possession and belonging to the defendant.

Defendant also read a receipt from Edward Carey to Chambers, releasing him as stockholder and director, from all liability to the Bank of Columbus.

Defendant then closed his case, and the Court charged the jury as follows:

That to enable the plaintiff to recover his demand of the defendant, he must show that he is a bill holder, and the defendant a stockholder; the outstanding circulation of the bank at this time, and that he has sued the bank to insolvency. It is conceded that the plaintiff owns $500 of the bills of the bank, and has sued the bank to insolvency. The defendant's liability is a secondary liability. There is no controversy about the defendant's owning 100 shares of stock in the bank. The plaintiff insists that the defendant owns 575 shares of stock in the bank, and that he is liable on them to plaintiff. Defendant insists that if he is liable at all, he is only liable on 100 shares. That is for you to determine between them. It is admitted that McDougald purchased and had transferred to the name of the defendant 475 shares.

Now, if you think that McDougald did purchase and transfer (for the purpose of hiding it from the public,) the 475 shares to defendant's name, and that the defendant knew at the time the object of McDougald, and acquiesced in it, he is liable on them. But if the defendant was ignorant of it, and when he found it out he did, in a reasonable time, divest himself of it, he is not liable on these 475 shares. But if he was ignorant of it at the time, and after finding it out, he neglected it for a considerable period, and thereby enabled McDougald to commit a fraud upon the public, he is liable on them.

The great question in the case is, is the defendant liable on these 475 shares? for it is conceded if he is liable at all, he is liable on 100 shares, the other shares which it is admitted he owned. The defendant's liability is in the proportion his stock bears to the capital stock of the bank. Stockholders are bound to redeem the liabilities of the bank in this *pro rata* measure. Then, you must ascertain the circulation. One witness, (M. Robertson,) it is admitted, says, at a certain time, about the winding up of the bank, it was $226,000; it is further admitted the book "State of the Bank" shows that on 7th February, 1843, it was $231,310. The law presumes where a fact is shown to exist once, it continues to exist until the contrary is shown. It is conceded that the bills of the Planters and Mechanics Bank, belonging to the Bank of Columbus, do not constitute any of the liabilities to be redeemed by the stockholders, for the Planters and Mechanics Bank was illegally organized, and the Bank of Columbus was a participant in the organization, and therefore, you will not take that amount into consideration. Plaintiff's counsel admitted that you will not take Mustian's, or Bailey's, or Bonner's, or the bills in the hands of the receiver, into consideration, in finding the amount of the outstanding circulation. The defendant is bound to redeem his *pro rata* part of the circulation at this time. It is admitted that the defendant has in his possession $1,530 of the bills of the Planters and Mechanics Bank. The law presumes he has redeemed that amount, and you must give him credit for that amount. If you should believe his liability does not exceed that amount, find for the defendant with costs of suit. But if you should believe that his liability exceeds that amount, subtract that amount from the amount you find him liable for, and give the plaintiff verdict for the balance. To all and every part of which charge, as delivered by said Court to the jury, the defendant by his counsel then and there excepted, and now assigns the same as error.

The defendant then by his counsel ask the Court to charge the jury, that if they believe that John Banks' *pro rata* liability on 200 shares of stock was $2,000, and the plaintiff, for a valuable consideration, has released him from his *pro rata* liability on said stock, such release will prevent the plaintiff from recovering any thing from defendant, or any portion of said stock transferred to him directly or indirectly by John Banks, even though the plaintiff's claim is $500, and he received from John Banks but $100, or it is not in proof how much plaintiff received.

2d. And that if they believe that more than four years elapsed between the accrual of plaintiff's cause of action and the commencement of this suit, then it is barred by the statute of limitations.

3d. And if they believe from the evidence that more than six years elapsed between the accrual of plaintiff's cause o action and the commencement of this suit, it is barred by the statute of limitations.

4th. And if they believe that more than four years elapsed between Sheriff's return of *nulla bona* on the *fi. fa* in favor of plaintiff vs. Planters and Mechanics Bank and commencement of this suit, then it is barred by the statute.

5th. And if the jury believe that more than six years have elapsed between the return of *nulla bona* on plaintiff's *fi. fa.* against the Planters and Mechanics Bank and the commencement of this suit, then it is barred.

6th. And if the jury believe that more than four years elapsed between the deed of assignment by the bank to Alexander, or between its recognition by the Act of 1843 and the commencement of this action, then it is barred by the statute.

7th. And if the jury believe that more than six years elapsed between the deed of the bank to Alexander, or between the recognition by the Act of 1843 and the commencement of this action, then it is barred.

8th. And if the jury believe plaintiff's action is "founded on notes," (bank bills,) and more than six years elapsed between their date and the commencement of this suit, then it is barred.

9th. And that an action of debt is barred in four years.

10th. And that an action of debt is barred in six years.

11th. And if the jury believe that more than four years elapsed between the failure of the bank to pay its bills in specie and the commencement of this suit, then it is barred.

12th. And if the jury believe than more than six years elapsed between the failure of the bank to pay its bills in specie and the commencement of this action, it is barred.

13th. And if the jury believe from the evidence that the defendant became a stockholder by transfer from other stockholders after the failure of said bank, and the stockholders so transferring to defendant had not been discharged from liability in terms of the charter, then said stockholders remain liable to bill holders, as sought to be enforced in this action, and the defendant is not liable.

14th. And if the jury believe from the evidence that the defendant had, before the assignment made by said Banks, and before the forfeiture of its charter, and while said bank continued to do business, and was able to pay its debts, transferred the stock held in his name, or any part thereof, to solvent and responsible parties, then the persons to whom he so transferred are liable, as sought in this action, and not this defendant.

15th. And to charge that if the charter of the Planters and Mechanics Bank expired by its own limitation on the 1st January, 1856, such expiration extinguished the plaintiff's debt, and that he cannot recover.

The Court refused each and every one of said charges, to which the defendant excepted, and on these several exceptions assigns error.

HOLT; and HILL, for plaintiff in error.

DOUGHERTY, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The Court decided that, Beall, the plaintiff, was not bound to answer any of the interrogatories propounded to him, except the first. And the first question is, was that decision right?

The interrogatories as to which this decision was made, had two objects in view; one, to prove that Beall obtained the bills at a discount—the other, to prove that he had made an agreement with his attorney, Mr. Dougherty; by which, Mr. Dougherty, was to bring suit for the collection of the bills, was to be responsible for the costs of suit, and was to have for pay, one-half, or one-third, or some other part of the money that might be collected.

We think, that neither of these objects was sufficient to require the interrogatories to be answered.

[1.] There is no law prohibiting the circulation of notes that are under par, whether the notes of corporations, or those of natural persons; and, in practice, notes under par, circulate as other notes.

[2.] Nor is there any law, saying, that one who purchases notes at a discount, shall not collect out of those liable on the notes, more than he gave for the notes. Of what concern is it to those persons, whether he gave for the notes, much or little, or even gave nothing. *Their* bargain was to pay all the notes call for, and, to any one who should present the notes.

[3.] Suppose it true, that Beall made a champertous agreement with his attorney, for the collection of the bills, yet did that make the bills themselves void as between *Beall and the parties liable on the bills?* No one will say so. But unless the bills were thus void, Beall had the right to sue upon them, and to collect them. Now, the suit brought is one which is Beall's, and which is upon the bills, which takes no notice whatever, of the existence of the supposed champertous agreement. It is not a suit to enforce that agreement; it is not a suit, the judgment in which, could be used in any way to help out, or ratify, that agreement. It would seem to follow, then, that if the champertous agreement did not make the bills themselves void, Beall had the right to sue upon them, as he has done in this case.

We think, then, that the Court was right in not requiring the interrogatories to be answered, and was also right, in refusing to permit the answer to the eleventh of them, to be read.

One of the transfers of stock was "signed by A. B. Ragan, cashier." A. B. Ragan was the cashier of the bank, at the time of this transfer. This transfer was objected to, on the ground, that "the bank could not transfer stock,"—the meaning of which ground seems to have been, that the bank was forbidden to become the owner of its own stock, and, therefore, could not have had any stock to transfer. The objection was overruled, and the transfer received.

No law was read to us, prohibiting banks from acquiring title, to their own stock. And we do not know of any such law. And, as to *this* bank, its charter says, that it shall be, "able and capable in law, to have, purchase, receive, possess, enjoy, and retain," "lands, rents, tenements, hereditaments, goods, chattels, and effects, of what kind, nature or quality, whatsoever, and the same to sell, grant, demise, alien, or dispose of." *Pr. Dig.* 125. Here is an express grant of power to "purchase" and of power to "sell," every kind of "goods, chattels, and effects."

So the third section of the charter declares that "if there shall be a failure in the payment of any sum subscribed for," the shares upon which such failure shall happen, shall be forfeited, and they may again be sold, and the proceeds of the sale, together with the sums paid on the shares, shall revert to the benefit of the corporation. And see section 15.

[4.] We think, then, that the Court was right in admitting the transfer.

Two of the transfers to Robison, were signed by H. S. Smith, as attorney—one by him, as attorney for Wm. A. Redd, the other, by him, as attorney for Jno. E. Morgan. These two were objected to, on the ground, that "there was no evidence of Smith's being attorney for Redd, or for Morgan." The Court overruled the objection.

It is no doubt true, that these two transfers were void, unless Smith had authority to make them, or his making them was ratified by Redd and Morgan. The Court, in deciding that they were admissible, did not decide, that it would not be necessary, after their admission, to show Smith's authority. And, accordingly, some evidence was offered, going to show Smith's authority—doing so, it is true, in a very indirect, and perhaps a very slight manner. This evidence was, that Robison made a subsequent transfer of four hundred shares of the stock; and, that, without the shares transferred to him by Smith, he did not have four hundred shares, to transfer. If Robison transferred the shares which Smith, as agent, had transferred to him, he did what carried within it, a *prima facie* admission, slight, it is true, that Smith had authority to make the transfer to him.

At all events, we do not think, that the Court erred in *admitting* the transfers in the first instance; and no motion was made to rule them out, for a failure to prove Smith's authority.

Much of the statement of the witness, Mathew Robertson, which was rejected by the Court, consisted of what was his opinion, the materiality of the rest is not apparent to us,—not that we mean to say, that we think any of the statement to have been material. This it is not necessary to decide. There was no motion for a new trial.

The exceptions relating to the statute of limitations, we passs without deciding.

The thirteenth request to charge, was, that if Robison became a stockholder by transfer from other stockholders after the failure of the bank, and those stockholders had not been discharged from liability, in terms of the charter, they remained liable, and Robinson was not liable.

This request seems to be founded upon the assumption, that a transfer of stock made after a failure of the bank, would be void,—and therefore, that such a transfer would not make the transferer become a non-stockholder, or the tranferee, a stockholder.

But we do not see any authority for the assumption, that a transfer of stock made after a failure of the bank, would be void. The charter does not seem to know any difference between the right of transfer before a failure of the bank, and the right of transfer afterwards. It merely says, in general terms, that the directors "are authorized to open transfer books, by agents or otherwise, whenever they may deem it advisable." (14. Sec.)

It is true, that the 16th section says, "that in case of a failure of the said bank, all the stockholders who may have sold their stock at any time within six months prior to said failure, shall be liable in the same manner as if they had not sold their stock." But this is a provision for a different case, that of a transfer "*prior*" to a failure of the bank—and the provision, even for that case, is not that the transfer *shall be void*, but that the stockholder making it, shall remain liable in the same manner as if he had not made it. Indeed, the provision, by speaking of the stock as having been "sold," itself silently assumes, that the sale, (or transfer,) would be good.

Different was the provision on which, *Lumpkin et al. vs. Jones*, turned. That provision was, "that all transfers of stock in said bank shall be wholly void, if made within six months previous to the failure of the said bank," &c.

Different too are the provisions on which, the decisions from other States went.

These things being so, and the 11th section of the charter declaring, that "no stockholder shall be relieved from" his "liability, by sale of his stock, until he shall have caused to have been given, sixty days notice in some public gazette of this State;" and, there not being any evidence, that such a notice was given by Robison, we think, that the Court was right in refusing this 13th request.

The fourteenth request was, to charge, that if Robison had, before the assignment made by the bank and before the forfeiture of its charter, and while it continued to do business and was able to pay its debts, transferred the stock held in his name, or any part thereof, to solvent and responsible parties, then they and not Robison, were subject to the liability sought to be enforced by this action.

The liability here referred to is, that created by the 11th section of the charter; a section which is in these words: "The persons and property of the stockholders shall be pledged and held bound, in proportion to the amount of shares and the value thereof that each individual or company may hold in said bank for the ultimate redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt, and no stockholder shall be relieved from such liability by a sale of his stock, until he shall have caused to have been given, sixty days notice in some public gazette of this State."

Two things seem to be clearly expressed by these words; 1st. That the stockholders are to be under a certain liability, at least whilst they are stockholders: 2dly, that they are not to be relieved from this liability, whatever it is, by a sale of their stock, until they have caused to be given sixty days notice of the sale in some public gazette.

The question then is, what is this liability which they are under? The section says, it is a liability "for the ultimate redemption of the bills or notes issued by the bank." The words "bills or notes issued by the bank," are certainly such, that they will include, in the case of any stockholder, at least, all of the bills or notes that had been issued when he became a stockholder, and all that were issued whilst he remained a stockholder.

Robison sold his stock in 1841. The bills on which, the suit is founded, were issued in 1838. They therefore, at least, are bills to the ultimate redemption of which, his liability extends.

We see no error in the refusal of the Court to give to the jury this, the fourteenth request to charge.

The fifteenth request to charge, was: "That if the charter of the P. and M. Bank expired by its own limitation on the 1st of January, 1856, such expiration extinguished the plaintiff's debt." This request was refused; and the question is, was that refusal right?

When the charter of a corporation expires, all things which owe their existence to the charter expire too, unless there is some special law to prevent them from doing so. To deny this, is to deny that, when the cause ceases, the effect ceases; that, when the body dies, the limbs die.

One of the things which owed its existence to the charter of the Planter's and Mechanics' Bank, was the bank itself, as a corporation. Therefore, when that charter expired, the bank, as a corporation, was dissolved, unless there was some special law to prevent it from being dissolved.

There was no such law. The acts of 1840, 1841, 1842, and 1843, extend to the case in which there are proceedings for the *judicial* forfeiture of a charter; not to the case in which there is an expiration of a charter. The act of 1855 (acts 226) does not seek to prevent the expiration of a bank's charter, from working a *dissolution* of the bank.

Consequently, when the charter of the P. and M. Bank expired, the bank was dissolved.

What effect did *the dissolution of the Bank* have on the debts due from the Bank? The effect to extinguish them, unless there was some special law, to prevent it from having that effect.

"At common law, upon the civil death of a corporation, all its real estate remaining unsold, reverts to the grantor and his heirs; for the reversion in such an event is a condition annexed by the law, inasmuch as the cause of the grant has failed. The personal estate, in England, vests in the King, and in our country in the people or State, as succeeding to this right and prerogative of the Crown. The debts due to, and from it are totally extinguished."—*Ang. and Ames. Corp.* 667.

"At common law, upon the dissolution of a corporation, the debts due to and from it are extinguished." Head notes *in Hightower vs. Thornton, 8 Ga.*, 486. Head notes are made by the Judges.

"Why so much time and talent, labor and learning have been employed to establish a proposition which nobody denies, viz: that the debts of a corporation either to or from it are extinguished by its dissolution, I am at a loss to comprehend." *Thornton vs. Lane,* 11 *Ga.*, 491.

"Moreover, I agree that the elementary writers, both in England and the United States, do everywhere assert distinctly, that the debts due to and from a corporation, are extinguished by its dissolution, unless prevented by the terms of the charter itself, or by *aliunde* legislation; and, that in the Courts of both countries, this doctrine may now be considered too well settled to be overthrown or shaken; and so totally extinguished, that the members of the corporation cannot recover or be charged with them in their natural capacities." *Lumpkin J. in Moultrie vs. Smiley,* 16 *Ga.* 294.

"For all the purposes of this decision, we have conceded that all *corporate* rights and liabilities are extinguished by the dissolution of the bank on the first of January 1852."—*Lumpkin J., Id.* 324.

"The difficulty which has arisen, as I think, grows out of an error in applying the common law rule, that upon the dissolution of a corporation, its real estate reverts to the grantor; its personal estate goes to the Crown, (in this country to the State,) and its debts are extinguished, to the case made against these plaintiffs in error." *Starnes J. Id.* 331.

To the same effect are the decisions elsewhere made. See *White vs. Campbell et al.* 5 *Humph.* 38; *Paschall vs. Whitsett,* 11 *Ala. N. S.* 472; *President &c. of Port Gibson vs. Moore,* 13 *Smedes and Mar.* 158; *Fox. vs. Horah,* 1 *Ire. Eq. R.* 358; *Coulter et al. vs. Robertson,* 2 *Cushman R.* 321; *Vi-*

ner Abr. Rent, B. b. 4; *Edmonds vs. Brown and Sillard*, 1 *Levinz* 237; *Mayor of Colchester vs. Seaber*, 3 *Burr.* 1866; see my opinion in *Moultrie vs. Smiley*, 16 *Ga.* 344 *et Seq.*, and in *Robinson vs. Lane*, 19 *Ga.* 380 *et seq; Vin. Corporations* (*I.*) 6 (*I.* 3 7) 11.

There is, then, universal accord in this; that the rule of the common law is, that on the dissolution of a corporation, the debts due to and from it are extinguished. *Extinguished* is the word.

According to this rule, therefore, the effect of the dissolution of the Planter's and Mechanics' Bank, was, to extinguish the debts due from the Bank.

But whatever extinguished the debts, as against the Bank itself, equally extinguished them, as against the Bank's stockholders; for these were only ultimately liable for those debts; that is, liable only after the bank; and it is a general principle of law, that whatever extinguishes the debts, as to the party primarily liable, equally extinguishes it as to the party secondarily, or ultimately, liable.

According, then, to the common law rule, when the Bank was dissolved, the debts due from it, were extinguished, both as to itself, and as to its stockholders.

I am aware that this conclusion is denied and denied on the following argument: the *reason* of the common law rule is, that, on the dissolution of a corporation, there is, commonly, left no person to sue, or be sued, for the debts due to and from it; but, on the dissolution of this corporation, there were left persons to be sued for the debts due from it on its bills, viz., the stockholders; therefore, as it regards those debts of this corporation, the reason ceasing, the rule ceased, and they were not extinguished. 16 *Ga.* 294. But I meet this argument with three answers, any one of which is, I think, sufficient:

1. Courts cannot set aside a plain rule of law, on a mere conjecture; on, what they guess to be the reason of the rule; and, it is the merest conjecture, that the want of some per-

son to sue or be sued, is the reason of this rule; nay, a conjecture against which, there is to be set, another conjecture, equally plausible; viz., a conjecture that the reason why the law extinguishes the debts of a dissolved corporation, is, that the law first strips it of all its means of paying those debts, by causing its lands to revert, and its goods to escheat.

2. Numerous cases exist in which, there was somebody to sue and be sued, and yet, in which, the rule was applied. (See cases above.) In the case of the President &c., of Port Gibson vs. Moore, there was the *very corporation itself* to be sued; for the dissolved corporation had been *revived.* In the Mayor of Colchester vs. Seaber, there was an old charter, and a new. Seaber's defence was, that the corporation created by the old charter, had been *dissolved*, and, that his bond given to that corporation, was, consequently, extinguished—and, that being thus extinguished, it could not be collected by the new corporation, although that was the old corporation, revived. This was his defence; and it shows on its face, that there was some one to sue and be sued,—the revived corporation to sue, and Seaber to be sued. Yet the defence was not demurred out. No; it was met by a denial of the allegation, that the old corporation had been *dissolved.* Had that allegation been true, there was no question, with Court or counsel, but that the defence would have been good. In Edmonds vs. Brown and Sillard, Brown and Sillard had signed their names to the bond of the corporation. Yet, when it appeared, that the corporation had been dissolved, a *nonsuit* was granted in their favor. The case did not go off on the plea of *non est factum*, though that was in. It could not go off on that plea, for the plea was not true. Brown and Sellard did sign the bond, and the bond, thereby, became their deed. This is the foundation case. Here were persons to sue, the actual subscribers to the bond. Yet the rule was applied.

These three cases are but samples of those above cited.

3. It is not true, that, as it regards the debts of this Bank

due on its bills, the reason of the rule ceases. Those debts were the debts of the Bank, as well as of the stockholders; and, when the bank was dissolved, there was no person left to be sued for them, in so far as they were the debts of the bank. The reason, then—the want of somebody to be sued—*existed*, for applying the rule to them, in so far as they were the debts of the bank. According to the very argument itself, then, the rule applied to the debts in so far as they were the debts of the bank. But if the rule applied to them to that extent, it *extinguished* them to that extent; for it certainly extinguishes, wherever it applies. And, if it extinguished the debts in so far as they were the debts of the bank, that was also extinguishing them in so far as they were the debts of the stockholders—for the debts were debts on which, the bank was bound as the primary party, and the stockholders, only, as the ultimate parties; and the extinguishment of the debt, as against the primary debtor, is its extingnishment, as against all the other debtors.

For a fuller notice of this argument, I refer to my opinion in *Robison vs. Lane* 19 *Ga.* 380 *et seq.*

I repeat, then, that, according to the common law rule, when the bank was dissolved, the debts due from it, were extinguished, both, as to iself, and as to its stockholders.

In the language of Chancellor Kent—"According to the old settled law of the land, where there is no special statute provision to the contrary, upon the civil death of a corporation, all its real estate remaining unsold, reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished. Neither the stockholders nor the directors or trustees of the corporation can recover those debts, or be charged with them in their natural capacity." 2 *Kent Com.* 307.

Is there any special law to prevent the rule from applying to the debts of this bank. Neither the Act of 1840, or that of 1841, or that of 1842, or that of 1843, is such a law—for each of those Acts is confined to the case of a corporation whose charter is sought to be forfeited by a *judgment* of Court.

There is, it is true, the Act of 1855; (Acts 226;) but that is not, I think, such a law. The reason I have for thus thinking, I will state in the latter part of this opinion.

For the present, then, I say, that there was no special law to prevent the common law rule from applying to these debts, and therefore, that it did apply to them, and extinguish them, both as to the bank and the stockholders.

The effect, then, which the *dissolution of the bank* had on the debts due from the bank, was to extinguish them, both as to the bank, and as to the stockholders.

But the bank, as a corporation, was not the only thing which owed its existence to the charter; the liability of the stockholders for the ultimate redemption of the bills of the bank, was another thing which equally owed its existence to the charter. See 11th section of the charter. It must equally follow, therefore, that when the charter expired their liability expired. Whatever reason there is for saying, that the corporation itself expired on the dissolution of the charter, there is also for saying, that this liability expired on the dissolution of the charter. The existence of the corporation, was, in no greater degree, caused by the charter, than was the existence of the liability. On the other hand, the existence of the liability, was as exclusively due to the charter, as was the existence of the corporation. If the maxim, the cause ceasing, the effect ceases, applies to the corporation, it equally applies to this liability.

I might then rest the proposition, that when the charter expired, the liability of the stockholders expired, on this axiom: that when the cause ceases the effect ceases. But there is abundance of authority, to support the proposition. I merely refer, in this place, to a single case, and to the cases which it cites, and that is, the case of the *Bank of St. Mary's vs. Clayton*—12 *Ga.* 475.

There is no special law at all touching this liability of the stockholders.

It is true, then, that when the charter expired the liability of the stockholders, which owed its existence to the charter, also expired.

This is the same conclusion which we had obtained from the proposition, that when the bank was dissolved, the debts due from it, were extinguished.

Thus, then, we have the conclusion from two different and independent sources.

And is it not a conclusion in perfect harmony with other results of the dissolution of a bank? They are, that the dissolved bank shall be stripped of all its property and effects —that its lands shall revert to the grantor; that its goods shall escheat to the State; that the debts due *to* it, shall be extinguished. Ought it not to be, then, also, that the debts due *from* it should be extinguished? When the law gets all of a bankrupt's property and effects, it extinguishes the debts against him. This is the principle of bankrupt laws.

And, then, to dissolve a bank in the face of such results, without providing against them, must be an act of mere reckless mischief, sufficient to deprive those at whose instance it is done, of the right to complain, if, when the question comes, which, among innocent parties, are to be preferred, they are left out. Ought they to stand on as good a footing, as the accommodation drawers and endorsers for the bank, or as any guarantors or sureties of the bank. And the stockholders, by the very terms of their engagement, are nothing but guarantors or sureties for the bank. But for those terms, they would, no more, be at all liable for the debts of the bank, than would any other strangers. They have suffered once already by the bank; they have lost all the money they put in it, for stock—and it was that money, really, which the creditor in dealing with the bank, agreed to look to, as his *principal* debtor. The stockholder, then, is, not only, by the terms of his contract, but by the principles of equity, only a surety.

Now what is offered in opposition to this double conclusion? That either set of the premises from which it is drawn, is not true? No. That it is a conclusion not authorized by those premises? No. What then? This, that it is a conclusion in conflict with the decisions of this Court; and, that, this Court is bound to follow those decisions, by the maxim, *stare decisis.*

I proceed then, to inquire, first, whether it is true, that the decisions of this Court are in conflict with this conclusion. Secondly, whether, if that is true, as to them, or any one of them, this Court is bound to follow them by the maxim, *stare decisis.*

First, then, is it true, that the decisions of this Court, are in conflict with this conclusion?

Now it cannot be that they are, unless the cases in which they were made, are *analogous* to this case. Let us bear in mind then, what this case is. It is, in the first place, a case against a *stockholder*, not, against a *director;* and, in the second place, it is a case in which, the defence is, the *extinction* of the charter, not its forfeiture by the *judgment* of a Court.

And let us also bear in mind the following things. There is an act of the legislature, the act of 1842, (*Cobb Dig.* 118,) which, referring to this, and other banks, then suspended, has these words. "The Judge shall pronounce the judgmen of the dissolution of said corporation for all purposes, whatsoever, saving and excepting, as to its power in its corporate name, to collect and pay its debts, and to sell and convey its estate, real and personal." By these words, manifestly, the dissolution to be brought about by *a judgment*, was to be, not really a dissolution at all; certainly, not a substantial or total dissolution, but was to be, no more than a formal or partial dissolution. Now the difference between such a dissolution, and a substantial or total dissolution, is nearly as great as is the difference between no dissolution at all and dissolution. Consequently, it might well be, that extinguishment of the corporation's debts, would not follow such a dissolution, and yet, would follow a substantial dissolution—such a dissolution as is wrought, by the *expiration of the corporation's charter*. It must follow, that cases in which the dissolution was, by the judgment contemplated, (or held to be contemplated,) in the act aforesaid, are not *analogous* to cases in which, the dissolution was, by the expiration of the Charter, and, therefore, that the maxim, *stare decisis,* cannot apply between the two sets of cases.

Bearing these matters in mind, let us proceed to the decisions.

The first of the decisions is that in *Lane vs. Morris* (8 *Ga.* 468.)

In that case, the action, as, in the present, was against a stockholder of this bank, and a defence was; "that if the defendant ever was a stockholder, all his rights and liabilities, except so far as saved and reserved by statutory provision, had long since ceased and determined, by the forfeiture of the charter of said bank, viz: on 13th June 1843, as appears by the judgment of the Court declaring the forfeiture."

The defence, then, is, forfeiture or dissolution by *judgment*; and it is a defence which it self admits, that liabilities were saved by "*statutory provision*"—doubtless meaning the said Act of 1842.

There is, therefore, between this case, and the one in hand, the very want of analogy above adverted to. The decision in it, therefore, cannot be a law for the decision of the case in hand—and this is true, no odds what the grounds might be, on which the decision was put.

It is not clear, however, what the grounds were, on which the decision was put. The decision was, that the defence was not good, but whether the ground of the decision was, the act aforesaid of 1842, or was something else, is not stated.

What the Court said, was as follows: "Counsel for the defendant below and in error, argued, that upon the dissolution, of this corporation the debts due to and from it were extinguished; and that nothing could save the case from the operation of this common law principle, but the legislation which had intervened, appointing a receiver to collect and pay over the assets, that, consequently, all proceedings must be conducted in his name, and that a party who claims the benefit of this legislation, must pursue his remedy in accordance with it. The Court sustained this position and ruled that the action could not be maintained by the present plaintiff, but that under the Act of 1842 and 1843 appointing an assignee, suit could be brought by him only, and no one else."

"In the opinion of this Court, the right of the billholder, under the 11th section of the charter, to hold the personal property of the stockholder pledged and bound for the ultimate redemption of the bills and notes of the bank, in proportion to the amount of his shares and the value thereof—a right which is not *primiary* and *total*, but *secondary* and *proportional*—is one which he may assert in his own name, before or after the *formal* dissolution of the corporation; one which is wholy above and beyond the reach of any legislaion, and independent and irrespective of it. The power and duty of the receiver, appointed by the legislature was to take charge of and collect as early as practicable, the debts and demands due and owing to the bank, and to pay off and discharge its liabilities. *See Pamphlet Acts* 1842, *p.* 29, 1843 *p.* 21, 22. But the recovery in *this action* constitutes no part of the assets of the bank, but is a supplemental or superadded security for the benefit of the billholder—one which he is authorized to enforce in his own name, in an action of debt at law directly against the stockholder." (476.)

"After the *formal* dissolution of the corporation"—what did the Court mean by this word, *formal* which it italicised? Did it not mean, the sort of formal or partial dissolution directed by the Act of 1842? We are bound to suppose, that it meant a sort of dissolution, like that which existed in the case it was deciding, and that, was the dissolution directed by the Act,—provided, the judgment declaring the dissolution, was in accordance with the Act, or, if not in accordance with the Act, was void for the difference. The judgment was not in accordance with the Act; it was a judgment of substantial and total dissolution, and thus, it was not in accordance with the Act. But this Court has held, (I dissenting,) that the judgment was void for the difference, or, was to be construed as not differing from the Act. 19 *Ga. R.* 337.

I think, then, that we are authorized, if not required to say, that the Court meant by the expression, "the *formal* dissolution of the corporation," the sort of dissolution directed by the Act of 1842, which, as we have seen, was no dissolution at all.

If this was the Court's meaning, then we may say, that the Act of 1842, was the ground of the decision.

Another reason for saying this, is, that in subsequent cases, the Act is more distinctly made the ground of the decision, as we shall see. (11 *Ga.* 492; 19 *Ga.* 347-354.)

So much then, for the first of the decisions. It is seen to be a decision which was made in a case differing, essentially, from the present, and which was put as far as appears, on that very difference.

Only two Judges, (Judges Lumpkin and Nisbet,) sat in the case; and against those two, was the opinion of the Court below.

The *next* of the decisions, is that made in *Hightower vs. Thornton,* (8 *Ga. R.* 486.) There is much less analogy between that case and the present, than there is between the last case and the present.

The facts were these. Hightower had a judgment against Thornton, a stockholer in this bank—a judgment founded, not on the bills of the bank, but on a certificate of deposite of the bank. The bank was insolvent, and Thornton owed it a part of his subscription for stock. Hightower brought a bill against him, alledging these facts, and also alledging, that the charter of the bank, had been forfeited by a "decree" of the Court, and praying that Thornton might be compelled to pay up the unpaid part of his subscription, and that the money thus paid up, might be applied to the satisfaction of the judgment.

Now here, the dissolution was not a dissolution by expiration of charter, but was the very same dissolution as that in the last case, viz; a dissolution by "decree"—by judgment of the Court, and, therefore, was a dissolution affected in the same way, by the act of 1842, as, that was.

In this respect, then, there is precisely the same want of analogy between the case and the present case, as there was found to be, between the last case and the present case.

But this is far from all. The bank had, previous to the "decree" of forfeiture, made "an assignment of all its property real and personal, and all its debts, credits, and effects, to trustees, for the benefit of all its creditors and stockholders;" and the legislature had declared, that this assignment was to "be taken, held, and considered, valid for all purposes, both in law and equity." *Cobb* 121.

This assigment, then, conveyed to the trustees all the property, and all the debts, credits and effects, belonging to the bank, and thus placed them where they could not be reached at all by any dissolution of the bank, even one, the most total and absolute. Therefore, if the unpaid subscriptions made a part of the property, or of the debts credits and effects, belonging to the bank, the assignment conveyed those unpaid subscriptions, to the trustees, and thus placed them entirely beyond the reach of any dissolution of the bank, even a dissolution the most total and absolute.

Now, the decision of the Court was, that the unpaid subscriptions did make a part of the property of the bank—that they were "a trust fund for the payment of the debts," of the bank. (503.) Consequently, the Court must have held, that they went, with the rest of the property, debts, credits, and effects, to the trustees, and thus, got beyond the reach of a dissolution of the bank. Accordingly, the direction the Court gave to the case was, that the unpaid subscriptions must be sued for, in the name of the trustees or assignees.

The Court having made this decision, put the question of the effect of the judgment of forfeiture on the debts due to and from the bank, entirely out of the cases; for, according to the decision, the unpaid subscriptions had ceased to be debts belonging to the bank, when the judgment was rendered, and had then become debts belonging to the trustees, in trust for the creditors and stockholders.

In this second respect, then, there is, if possible, a still greater want of analogy between the case, and the present case, than there was found to be between them in the first respect.

Now, it must be manifest, that where there is such a want of analogy between two cases, as there is between these two, no argument can be made from the one to the other.

This case of *Hightower vs. Thornton* was decided at the same term as the last case; and the same two judges presided in it, and the decision had against it, the opinion of the same lower Court.

So much for the second of the decision.s

The next of the decisions is that in *Thornton vs. Lane* (11 *Ga. R.* 459.)

In that case, the action was against Thornton, a stockholder of this bank, on the same 11th section of the charter of the bank; and one of the defences was, the forfeiture of the charter by judgment of the Court.

Here again, is the very same dissolution that there was, in the two former, cases, viz; a dissolution by judgment, not by expiration of the charter. Consequently, this case falls, in this respect, as much within the act of 1842, as those two did, and therein, differs, as they did, from this case. And the Court makes the difference a ground, if not, the ground, of its decision. The Court says:

"Why so much time and talent, labor and learning, have been employed to establish a proposition which nobody denies, viz: that the debts of a corporation, either to or from it, are extinguished by its dissolution, I am at a loss to comprehend. Certain it is, that it was recognized by this Court at this place two years ago, as it had been on more than one occasion previously."

"In *Hightower vs Thornton and others* (8 *Ga. R.* 4 86,) this Court says, upon the threshold of this argument, we are met, with the common law principle, that upon the dissolution of a corporation, all the debts due to it and from it, are extinguished. A doctrine which results necessarily from the fact, that the corporation having expired, whether by its own limitation, by surrender, abandonment of its members, or judgment of dissolution, there is no one in law to sue or be sued."

"That this doctrine is "*odious*" is evidenced by the fact, that a majority of the American States have already by their "enlightened legislation" "interposed to prevent, to ward off the iniquitous consequences" of this common law rule, the existence off which, I take it upon myself to affirm, is "a disgrace to a civilized State." Georgia is not obnoxious to this reproach, as far as this corporation and others in its vicinity, *in pari delicto*, are concerned. She has made ample provision to rescue *them* from the operation of this rule. Such being the rule however, and the foundation of it, this Court does not feel itself called on to extend it one jot or title, beyond the reason which gave it birth." *Ib* 492.

"Georgia" "has made ample provision to rescue *them*," (this bank being one of them,) "from this rule." This, is as much as to say, that, but for this "provision," they would have been subject to the rule, and, therefore, it is making this "provision" the very ground of the decision. What "provision" was this? Doubtless the Act of 1842, which declares, as we have seen, that "the judge shall pronounce the judgment of the dissolution of said corporation for all purposes whatsoever, saving and excepting as to its power in its corporate name, to collect and pay its debts and to sell and convey its estate real and personal" (*Cobb* 118.) But in this Act, is nothing about dissolution from expiration of charter. Georgia has made no "provision" "to rescue" a corporation dissolved by expiration of charter, from "the common law rule." That corporation, then, is still subject to the rule.

The case, then, stands on precisely the same footing as that of *Lane vs. Morris*, the first of the two already considered. And so thought the Court itself, for they say; "We are content, therefore, after the most mature reflection to reaffirm merely on this point the views which we expressed when it was first presented for our consideration, in *Lane vs. Morris*," &c.

I pass to the next case, which is the *Bank of St. Marys vs Clayton.* (*12 Ga. R.* 475.) This, it is true, is not a "bank case," but it is a case, for all that, much more like the present, than are any of the "bank cases" which I have noticed.

"This was an action brought upon the information of Philip A. Clayton, against the Bank of St. Marys, for the recovery of the penalty imposed by the Act of 1835, for the issuing of change bills." After the commencement of the suit, but before judgment, the Legislature repealed the Act of 1835. One of the provisions of the Act of 1835 was, that "Any bank or body corporate or person or persons whomsoever, offending against the provisions of this Act, shall forfeit for each offence the sum of $500, to be recovered and applied as provided for by the second section of the Act hereinbefore recited." That section was as follows: "Any bank or corporate body, or person or persons whomsoever, offending against the provisions of the first section of this Act, shall forfeit the sum of one hundred dollars, to be sued for in the name of the State by any licensed attorney, on the application of any informer cognizant of said offence, who shall be a competent witness on the trial, and recovered by an action of debt or on the case, in any Court of competent jurisdiction in this State, with full costs; one-half whereof when recovered, shall be paid to the use of the State, and the other half to the use of the informer."

The penalty is "to be sued for," "on the application of any informer." Of course, then, the right *to sue* for the penalty, and by the suit, to recover the penalty, is to vest in the informer. True, the Act says, that the money "when recovered," is to be paid, one-half to the State, and the other half to the informer; but this is not saying, that the right to these halves, respectively, is not to vest before the recovery. The time when money is to be paid, is no test of the time, when the right to the money vests. *Debitum in presenti, solvendum in futuro*, is a common case. Suppose this penalty paid after suit, but before recovery, would not the informer be entitled to one-half of it? Surely he would.

Under this Act, then, the right to sue for the penalty, vests in the informer. Clayton, the informer's, suit, was in the assertion of this right, and whilst the suit was pending, the Legislature repealed the Act. In the present case, the charter gave Beall the right to sue Robison, as a stockholder; his suit was in the assertion of that right, and whilst the suit was pending, the charter expired. Here is analogy.

What was the decision?

Let the words of the Court answer.

"But the main question in this case is, whether any judgment can be rendered in an action founded on a penal statute, after its repeal."

"We are clear, both upon principle and precedent, that a penalty cannot be recovered after the expiration of the law which imposes it, either by its own limitation, or a repeal by the power which enacted it, without an express provision to that effect, in the repealing statute; and that it makes no difference whether the penalty, when recovered, goes entirely to the public or to the informer, or whether, as in this case, it is divided between them." 12 *Ga. R.* 481.

Many cases are cited, sustaining this position. Of these, I will refer to but two, one, decided by an English Court, the other, by the Supreme Court of the United States.

The former is thus stated in the decision: 12 *Ga.* 485.

"Under the insolvent debtors act, (1 *George* III,) one Miller was compelled, by a creditor, at the *sessions at Guildhall*, to give up his effects, and he accordingly signed and swore to his schedule. But some circumstance arising, the Court adjourned his discharge till the next sessions. In the mean time the statute 2 George III passed, which repealed the compelling clause. Motion for a *mandamus* to the justices now to proceed to grant Miller his discharge, the jurisdiction having attached before the clause was repealed. But by the Court: Nothing is more clear, than that the jurisdiction is now gone, and that we cannot grant any such *mandamus*. Even offences committed against the clause (while in force,) could not have been now punished without a special clause to allow it; and therefore a clause is inserted in the repealing statute for that purpose. 1 *W. Blackstone's Rep.* 451."

In this case, the insolvent debtor had given up his effects, had signed his schedule, and had sworn to it; had done all that he was to do. But he had not obtained his actual discharge. The Act giving him the right to the discharge, was repealed. The Court held, that the right went with the statute giving it.

The latter of the two cases, is thus stated in the decision; *Id.* 493.

"The same doctrine is enforced in the recent case of *Norris vs. Crocker et al.* 13 *Howard's U. S. Supreme Court Rep.* 434. And as this case covers all the points made upon this record to the fullest extent, I felt strongly inclined to rest our judgment upon its authority alone."

"It was an action of debt, brought by the owner of a fugitive slave, to recover the penalty of $500, under the Act of 1793, against the defendants, for harboring his slave. While this suit was pending, the Act of 1850, was passed, known as the fugitive slave law. Defendant pleaded as a defence that the Act of 1850, repealed by implication the Act of 1793, and consequently, abated the suit. The Court held that the Act of 1793, was repealed by implication; and then used this strong language:"

"The next question referred to us for decision, presents no difficulty. The suit was pending below when the Act of September, 18, 1850, was passed, and was for the penalty of $500, secured by the 4th section of the Act of 1793. As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the Court of jurisdiction over the subject matter; and, in the next place, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law. We, therefore, answer to the second question certified, that the repeal of the 4th section of the Act of 1793, does bar this action although pending at the time of the repeal."

Here, the U. S. Court say, "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the Court of jurisdiction of the subject matter;" so, I say, in the present case, that the billholder's right to recover, depended entirely on the charter, and, therefore, that the expiration of the charter, deprived this Court of jurisdiction over the subject matter.

These two cases, as well as the principal case, itself, were cases in which, that on which the right depended—the statute—died by repeal—a sort of death to take men by surprise; the case in hand, is one in which, that on which the right depended—the charter—died by the expiration of the originally allotted term of its life—a sort of death for which men might be prepared, this term of its life being a thing known to all men. Consequently, there is less interference with "vested rights," to hold, that in the latter case, the right died with that on which it depended, than there is, to hold, that in the former cases, the right died with that on which, it depended.

It is true, that in the principal case, the right was a right to a penalty. But what is the difference between the case in which, the right is a right to a penalty and the statute giving the right has ceased to exist, and the case in which, the right is a right to a suit against a stockholder and the charter giving the right has ceased to exist? None, I say. There can, no more, be anything in the latter right, to enable it to survive its cause, than there is in the former right, to enable it to survive its cause. Equally, in both cases, the cause of the right ceasing, the right itself, the effect, must also cease. It may be true, that a charter will not, so readily cease to exist, as will a statute giving a penalty; it may be true, that there is no legislative power to repeal a charter, when there is such power to repeal a statute giving a penalty—but yet if, by any means, the charter does cease to exist, it surely is as dead, as the statute is, when it ceases to exist. Now, in the present case, there can be no doubt, that the charter did cease to exist; it expired by its own limitation. Then, there can be no difference, between the two cases.

And in each case the right was a *chose* in action—was but a right to sue. When the crime was committed, the informer acquired the right to sue the criminal; when the bank failed, the billholder acquired the right to sue the stockholder. The two rights were precisely alike, with respect to the degree of their perfectness. Therefore, if it be true, that the nformer's right was "inchoate," so, equally, must it be true, that the bill holder's right was "inchoate."

I remark, that the repealing Act contained a provision remitting the penalties incurred under the repealed Acts; but the Court makes no use of this provision; the Court puts its decision, exclusively, on the repealing provision; and well it might, for the two provisions include each other. To repeal a right, is to remit the corresponding liability; to remit a liability, is to repeal the corresponding right. And so, to repeal the right to these penalties, was, to remit the liability to pay the penalties; to remit the liability to pay the penalties, was, to repeal the right to the penalties.

The English case, however, was not the case of a right to a penalty. It was the case of a right to a discharge under the insolvent laws—a right that commends itself to favor, (our Constitution and laws being the judge,) as much as any right can.

This case of the *Bank of St. Marys vs. Clayton*, and the two cases cited from it, and, I may add, the other cases in it, are, then, all similar to the present case, in every essential particular; and the decision in it, and the decisions in them, were, *not against*, but, *for*, the proposition, that, when a charter expires, the rights depending on it also expire. If, therefore, contrary to what I have supposed, the intention of the three former decisions, was, not, to put themselves upon the special law of 1842, which directed only a "formal" or partial dissolution, but was, to deny this proposition, then with them, comes in conflict this later decision, and all those decisions on which it rests.

I pass to the next decision, that made in *Moultrie vs. Smiley*, 16 *Ga.* 289.

In that case the action was against the *Directors* of the Commercial Bank of Macon, and was founded on that provision of the bank's charter, which makes its directors liable for any "excess" of indebtedness in the bank, beyond "three times the amount of their stock paid in, over and above the amount of moneys actually deposited in their vaults, for safe keeping."

The defence was, that pending the suit, the charter had expired.

The case, then, is like this, except, that this is against a stockholder, while it was against directors.

The decision was, that the defence—the expiration of the charter—was not a good one; but the decision was not unanimous, I dissented from it.

The difference between the case and this case, in the view which I took of the case, is not material; but, in the view which the other two members of the Court, took of the case, that difference is, perhaps, to be considered material.

They seemed to think, that the liability of a *director*, is primary and *independent*, not secondary and dependent, like the liability of a stockholder, which is only ultimate.

Lumpkin J. says, "I am not prepared to say, that the directors in this case, who were guilty of the mismanagement, would not be individually liable to billholders, independent of this statutory provision." *Id.* 317.

Again, "who is the obligor and obligee, the promissor and promissee, under the 8th rule? Is it not the directors, under whose administration the excess was committed, on the one part, and the billholder on the other? What is it to them that the charter of the Commercial Bank of Macon, expired on the 1st day of January, 1852." *Id.* 317.

Again, "For *quoad hoc* they" (the directors) "are the body, and the corporation but the limbs. They are the head and front of this offending." *Id.* 320.

Again, "So, then, to make the definition from Burrill available, it should have been reversed. The legal maxim is, *Accessorium non ducit sed sequitur suum principale.* That the incident does not lead, but follows the principal. Whereas, here, the extinguishment of the collateral is made to work the extinguishment of the direct liability. In this instance, neither controls, but the one is wholly independent of the other." *Id.* 321. *Wholly independent* of the other, is a strong expression.

Again, "This suit is brought to enforce a distinct, separate and independent undertaking." *Id.* 323.

Distinct, Separate and independent, are words quite as strong.

Now if one liability is "wholly independent" of another—if it is "distinct, separate and independent" of another, it certainly is true, that it cannot be affected by anything whatever, that may happen to the other; and, therefore that it cannot be affected, by the extinguishment in any mode, of the other.

Judge Starnes seems to have entertained the same view. He says, "what show of reason is there in the proposition, that because the charter of the bank has been forfeited, and *its* debts are in this way extinguished, although this excess has never been paid, yet that no recovery can be had for and on account of it, against these defendants, who are severally and independently liable to pay it?" *Id.* 332.

Again, "The right to hold these directors responsible, cannot be said to depend alone, on the contract between the State and the corporators, but springs out of the statutory liability of these defendants, which, if not *ex contractu* is *quasi ex contractu,* and was incurred by each director when this excess happened." *Id.* 333.

It is not then, perfectly clear, that even this decision means to say, that the liability of a *stockholder,* which is only ultimate, and which is not independent of the liability of the bank, is not extinguished by the expiration of the charter. At most, however, it was but the decision of two, out of the three, members of the Court, the opinion of the other member being, that the liability expired with the charter.

I pass to the next of the decisions, that made in *Robison vs. Lane,* 19 *Ga. R.* 337.

That case differed from this only in one particular. The defence in it, was, a *judgment* of forfeiture of the charter; in this, the defence is, the *expiration* of the charter.

The Court was requested to charge, that if the charter "was absolutely and unconditionally forfeited, without reservation of the rights of plaintiff, and without retaining and continuing the liabilities upon the defendant, then all the debts due to and from said bank became extinguished." The Court refused so to charge, and that refusal made the question for this Court.

The decision of this Court, (I dissenting,) was, that the Court below was right in its refusal.

The main, I think I may say, the only, ground on which Lumpkin J. put his opinion, was, the same old ground existing in *Lane vs. Morris, Hightower vs. Thornton, and Thornton vs. Lane*; viz: special legislation—the said act of 1842, with the kindred acts of 1840, 1841, and 1843.

He says, "In *Thornton vs. Lane*, (11 *Ga. R.* 493,) in speaking of the odiousness of the old common law rule, that upon the dissolution of a corporation, the debts due to and from it are extinguished, and which, thank God, I have lived to see itself *extinguished*, by an authority not subject to review, I remarked, that 'Georgia is not obnoxious to this reproach so far as this corporation,' (the P. & M. Bank of Columbus,) 'and others in its vicinity *in pari delicto*, are concerned. She has made ample provision to rescue *them* from this rule.'"

"Let us glance for a moment at some of the enactments on this head."

He then gives the material parts of the Acts of 1840, 1842, and 1843, quoting that part of the Act of 1842 which required, that "the Judge should pronounce the judgment of dissolution for all purposes whatsoever, saving and excepting, as to the power in its corporate name, to collect and pay its debts, and sell and convey its estate real and personal." And then he exclaims, "And yet in the face of all this legislation and of this assignment by the bank, before its charter was forfeited, and of the legislative confirmation thereof, it is insisted that the liabilities of this corporation, and consequently, the personal liability of the stockholders, is extinguished! and wherefore? Suppose, it be true, that the debtors of the bank and the stockholders contracted in reference to the common law rule? Is it not equally true, that they contracted also in reference to the acknowledged right of the legislature to rescue the assets from this principle? And is not the one to be taken as much an element of the contract as the other.?" *Id.* 347-8-9

Again, he says, "Suppose it be true, that apart from the Acts of 1840, 1841, 1842 and 1843, the debts due to and from the bank would have perished with the corporation, how can it be pretended that they are not saved by the statutes." *Id.* 350.

And what is here said by Judge Lumpkin, shows that the view which I have taken of *Lane vs. Morris, Hightower vs. Thornton, and Thornton vs. Lane,* viz: that they were put upon these same statutes, is the true view.

It is true, that Judge Lumpkin says, (347,) "my mind has never wavered for a moment upon this question," (that of extinguishment.) "Whether considered upon general principles or upon our own special legislation relative to the subject;" but he does not state the general principles to which he refers, and he does state very fully the "special legislation relative to the subject." At any rate, the special legislation was there to be relied on, whilst it is not here to be relied on. Besides, he only speaks in the first person.

Judge McDonald also, had special grounds. He considered the case essentially different from the present, and rested his judgment, exclusively, on that difference. Had the case been, like the present, on the expiration of the charter, his judgment would have been, the opposite of what it was. He said, "I have no doubt, that, according to the common law, on the civil *death* of a corporation its debts are extinguished, and I have as little doubt that the legislature has power to prevent that effect. A corporation is factitious; and if the power which creates it, in the act of its creation, or by subsequent constitutional enactment, makes no provision for preserving and continuing the debts due to and from it, on its absolute dissolution, they perish with it—they become extinct."

"If the charter of the Planters and Mechanics Bank was repealed or annulled, and the corporation was absolutely dissolved thereby, unless they have been prevented by competent constitutional legislation the consequences ensue to which I have adverted." *Id.* 354.

This decision, then, is really a decision in *favor* of the proposition, that when a charter *expires*, the rights depending on it expire too. Two Judges, at least, expressly sanctioned that proposition. And as for the third, he thought the case *rescued* from the common rule, by special legislation—legislation which, as he conceived, prevented a *dissolution*, (an expiration) of the charter.

The dissenting Judge thought, that, as the judgment was in terms, one of absolute and unconditional forfeiture and seizure of all the franchises, including "*that of being a body corporate*," its effect was, of itself, to dissolve the corporation; that, even if it was erroneous, yet, that it was binding until set aside, especially as it had been acquiesced in, for twelve years.

I pass, then, to the next and last of the decisions, that made in *Moultrie vs. Hoge*, (21 *Ga. R.* 515.)

That was a case in which, the persons sued, were *directors* in the Commercial Bank of Macon. The defence was, the expiration of the bank's charter.

The case, then, was like this, with the exception, that in this, the defendant is a *stockholder*, not a director.

The decision was, "that by the expiration of the charter of said bank, the 'cause of action became extinguished.'" Lumpkin J. dissenting.

This decision, then, *supports* the proposition, that when the charter expired, in the present case, the liability of the stockholders also expired.

To sum up, the question is, Is it true, that the decisions of this Court are opposed to the proposition to which I came as a conclusion, viz: That when this charter expired, the liability of the stockholders expired with it.

Three of the cases, *Lane vs. Morris*, *Hightower vs. Thornton*, *and Thornton vs. Lane*, were cases in which, there was no expiration of the charter at all, but only a judgment of forfeiture; and there was a special law which directed that this judgment should not extend so far as to deprive the bank of the power, in its corporate name, to collect and pay its debts, and sell its property; that is, which directed, that the judgment should not dissolve the bank. This law, the Court thought, was operative and prevented the judgment from dissolving the bank. The decisions were, that the liability of the stockholder was not extinguished. These, then, are not decisions, that this liability would not have been extinguished, if the bank had, really, been dissolved. But in the present case, the bank was, really, dissolved, its charter had expired.

These three decisions, then, are not decisions in opposition to the proposition, which is, that when the charter expired, (a thing which *dissolved* the bank,) the liability of the stockholders also expired. They are decisions which do not touch that proposition. And the decisions themselves, not being in opposition to the proposition, it would make no difference, even if they were accompanied by some expressions denying the proposition, for, in such a case, the expressions would be mere *obiter dicta;* but indeed, the expressions which do accompany the decisions, are such as to justify us in saying, that the decisions were actually put, in great part, if not wholly, on the special law.

In one of these three cases, there was also, the assignment, and the law making it valid; and that was, itself, a decisive matter in the case.

These three decisions, then, count neither way.

Another of the cases, that of *Moultrie vs. Smiley,* was a case against *directors,* and though the Court decided, that the liability was not extinguished, yet, in doing so, it laid great stress on the ground which it took, that the liability of directors, is, distinct, separate, independent, primary. But the liability of stockholders, is only ultimate. It is not quite clear then, that even this decision ought to count as a decision in opposition to the proposition, that when the charter expires, the liability of the stockholder also expires.

Let it, however, be so counted. Then there is one of the decisions against the proposition; a decision, however, weakened by being dissented from by a third part of the Court.

Another of the decisions, that in *Robison vs. Lane*, made by two Judges against one, was, that the liability of the stockholders, was not extinguished, notwithstanding the judgment of forfeiture; but, there was in the case, the special law of 1842, as, in the first three cases; and, on that law, one of the two concurring Judges, in great part, if not wholly, put his opinion; and the other of the two put his opinion on the fact, that the judgment had not been *executed*, at the same time, saying, that if the case were one in which, the charter "was repealed or annulled, and the corporation was absolutely dissolved thereby," the liability would be extinguished. The third Judge thought that the judgment did dissolve the corporation and, therefore, that the liability was extinguished. This, then, is a decision which may be counted in favor of the proposition.

The same may be said of the decision in the *Bank of St. Marys vs. Clayton*, a decision, that when a statute giving a penalty is repealed, the penalty perishes. And this decision stands on many others, each one of which, has an independent value of its own. This, (throwing away these others.) makes two, in favor of the proposition.

The last of the decisions, that in *Moultrie vs. Hoge*, was, that when a charter expires the liability of the directors expires. But if the liability of the directors expires, at least as much, if not more, expires the liability of the stockholders, for that, beyond a doubt, is only ultimate. From this, one Judge dissented.

This makes three in favor of the proposition.

Thus then, of the seven decisions, three count neither way, one counts against the proposition, and three count in favor of it. And of these three, one dates before, and two date after, that adverse one, so that it finds itself between the upper and the nether millstone.

It turns out, then, not to be true, that the decisions of this Court, are in opposition to the conclusion, that when this charter expired, with it expired the liability of this stockholder.

Did *stare decisis* require, that these two decisions should not depart from their immediate predecessor? If it did, it equally required, that that should not depart from its immediate predecessor? Unless, *stare decisis* is to be applied, or, not applied, according to the side it favors.

I proceed to the second question.

Suppose it true, that the three first decisions, *Lane vs. Morris*, *Hightower vs. Thornton, and Thornton vs. Lane*, as well as the fifth, *Moultrie vs. Smiley*, are to be counted as adverse to the proposition, that when this charter expired, with it expired this stockholder's liability; and suppose the other two decisions, *Robison vs. Lane, and Moultrie vs. Hoge*, not entitled to be counted at all; then, is this Court bound by the maxim, *stare decisis*, to follow the four decisions? That is the next question?

Is a Court bound to follow every decision? If so, Courts have, from the beginning, been constantly failing to do, what they were bound to do. They have, again and again, time out of mind, overruled cases. There is now, a volume of these cases. The process still goes on, every where. It wont do to say, then, that a Court is bound to follow *every* decision.

Which decisions are they, then, that it is not bound to follow?

In my opinion, they are they, which are *clearly* contrary to law; especially, if, also, they are recent; are adverse to the current of legal opinion; and, if they betray marks of great repugnance in the Court making them, to the principle which they go to condemn. If it is not *clear*, that the decision is contrary to law, the decision ought, I think, to have the benefit of the doubt, and so, ought to be followed.

But, when a decision is clearly contrary to law, then, a Court ought not, I think, to follow it; for, if, when that is so, a Court follows it, the Court violates the Constitution of the State, and, if the decision be of a particular kind, and the case one happening anterior to it, violates, also, the Constitution of the United States; and, after all, does more harm than good.

When the Court follows a decision that is contrary to law, it turns that which is contrary to law, into law. This, is to make law. Therefore, the Court makes law. But the power to make law, is a power properly attached to another department of the State government, the legislative department; and the Constitution of the State says: that no Court "shall exercise any power properly attached" to another department of the government. Therefore, when the Court follows a decision that is contrary to law, it violates the constitution of the State. (Art. 1, Sec. 1.)

This is not all. The law thus made by the Court, is of a peculiar character; it works backwards as well as forwards. Why backwards? Because the Court, that which is to work it, regards it, not as a law made by the Court, and dating, therefore, from the decision, but, as a law made by the legislature, and dating from some time anterior to the decision, and merely declared by the decision. Consequently, the Court has to apply it to all cases happening after this anterior time, not even excepting those happening before the decision. And thus, it is a law that works backwards as well as forwards.

Now, suppose the decision be one, increasing the weight of some penal law, or one lessening the weight of some law of contract; suppose, for example, the decision be that death is the punishment for manslaughter, or, that six per cent. is the interest for lent money. Then, the decision, if, the former, and applied to a case happening previously to it, would be an *expost facto* law; if, the latter, and applied to a case happening previously to it, would be a law impairing the obligation of contracts. And the constitution of the United States declares, that no State ever shall pass any *expost facto* law, or law impairing the obligation of contracts Therefore, if a Court follows the decision, in either of these cases, it violates the Constitution of the United States.

But even were the two Constitutions out of the way, yet, if a Court follows a decision which is contrary to law, it does more harm than good.

In every instance in which, a Court follows a decision that is contrary to law, it divests vested rights. This, in the cases which happened previously to the decision, is an enormous wrong and hardship. The sufferers are men, not only innocent, but, positively meritorious—men who have kept what was really the law, and who could not foreknow, that a decision would come along, and say, that it was not the law, and yet, they are treated as law breakers and wrong doers.

And this is a mischief not to be compensated for, by any good that can come from following the decision. What good can come from following the decision? Men have regulated their conduct by it? If the decision be clearly contrary to law, men will be chary of regulating their conduct by it; they will distrust it, and provide against it. Suppose a decision, made, that a will, or a deed, without a witness, is valid, how many men would follow it? Very few, if any.

The number, then, that will regulate their conduct by a decision that is clearly wrong, will be few; and they, we may assume, will consist of the careless, or the speculating classes, neither of which are entitled to much favor. Especially, must this be true, if the decision be recent; if it be adverse to the current of opinion among lawyers; and, if it betray marks of great repugnance in the Court making it, to the principle which it denies. Now, surely, the good of upholding a small number of such men as these, is not a compensation for the evil of overthrowing such men as those first adverted to. But, even, if this number were greater, there is nothing to exempt them from a principle which is applicable to other men—the principle that all are bound to know the law. What answer then, could they return to the question—Did you not know, that a Court cannot make a law? None.

For these reasons, I think, that a Court is not bound, to follow such a decision.

The question, then, is, if the four decisions now in question, were, as I am assuming them to be, all adverse to the proposition, that when this charter expired, with it expired the liability of the stockholders, is it true, that they would be clearly contrary to law? I think it is.

To deny, that this liability expired with the charter, is to deny, that the things which depended on the charter for their existence, expired with it; and to deny this, is to deny, that when the cause ceases, the effect ceases; and if to deny, that when the cause ceases, the effect ceases, be not, clearly, contrary to law—to every law—I cannot conceive what would be.

This view, of itself, would be enough. But to deny this proposition, is to deny the authorities; is to deny the *Bank of St. Marys vs. Clayton*, and the many cases on which it rests; and, indeed, so far as I know or believe, every other case. As far as I know and believe, there is not one single case, that would support these decisions in denying this proposition.

There is no special Act which comes in, and saves the liability of *stockholders* from extinction.

But, referring to what I have said on this proposition, in the early part of this opinion, and, to my opinions in *Moultrie vs. Smiley*, (16 *Ga.* 340, *et seq.*) and in *Robison vs. Lane*, (19 *Ga* 380, *et seq.*) I forbear.

Are the decisions recent? Quite so. The oldest was made in 1850, the youngest in 1854. We may almost say, *res adhuc sub judice.*

Would the decisions, if such, as I am now assuming them to be, have against them, the current of opinion among lawyers? They would, from the best information I have.

Do they betray marks of great repugnance to the "common law rule," that when a corporation is dissolved, the debts due to and from it, are extinguished? Very great, I think.

In *Hightower vs. Thornton*, there is quoted with approbation, the remark of Chancellor Kent, made as counsel, and in extreme age, "that to permit the odious and obsolete doctrine of ancient date, before moneyed institutions were introduced, to be now applied to the dissolution of a bank, perhaps by its own mismanagement and abuse, so that all its assets were to be considered as dispersed to the winds, without any owner or power any where, to collect them, and justly apply them, *would be a disgrace to any civilized State.*" 8 *Ga.* 493. And no reference is made, to the above quoted antagonist doctrine promulgated by the Chancellor, as a teacher of law in his Commentaries. (*Supra and 2 Kent's Com.* 307.)

In *Thornton vs. Lane*, the doctrine is characterized, as, "odious;" and then, is added, this remark; "the existence of which" (the doctrine,) "I take it upon myself to affirm, is a "disgrace to a civilized State:" and, in another place, this remark; "the very idea is abhorrent to every principle of justice." 11 *Ga.* 492, 6.

In *Moultrie vs. Smiley*, it is said, that, "the rule itself has been justly characterized, by the most enlightened tribunals, as, odious and iniquitous." 16 *Ga. R.* 294. And again, "it is the duty of Courts, to put the most liberal construction upon these charters, and to struggle hard to get away from the common rule, so far as creditors are to be prejudiced by it." *Id.* 330.

Surely, here is exhibited, a degree of aversion to "the common law rule," so great that it, really, ought to warn us to distrust the decisions, which were adverse to the rule.

Now, is it likely, that many persons would regulate their conduct by such decisions? I think not. There is no evidence in this case, that any man ever did buy a single bank note, in consequence of the decisions. For ought that appears, all the notes of the bank were, even before the first decision, in the same hands in which, they now are. Certainly, there is no evidence, that Beall, the plaintiff below, did not have his bank notes, when the bank broke, long before the decisions.

If then, the decisions are departed from, as contrary to law, who will have been misled to their loss, and therefore, who will have the right to complain? There is nothing in the case, to warrant the belief, that a single person will have been.

On the other hand, if the decisions, being contrary to law, are not departed from, the effect will be, to divest all the men, women and children, that ever held stock in the bank, of valuable rights which the law gave them, and which were "nominated in their bond;" in a word, will be, to make them sufferers for trusting themselves and their property to the law itself.

I should say, then, that these four decisions ought to be departed from, even, if it were true, (as it is not,) that they are all adverse to the proposition, that when this charter expired, the liability of the stockholder expired with it; and were it also true, that the other two decisions opposed to these four, are entitled to no weight.

The Act of 1855—to preserve and dispose of, the property and effects of corporations after their dissolution, and to provide for the payment of the debts due by the same, was slightly referred to, by the counsel for the defendant in error.

But we all think, that there is nothing in that Act, to save the liability of *stockholders* from extinction. The Act says, that, "the debts due to and by the corporation"—shall not be extinguished. But it no where says, that the debts due from the *stockholders*, shall not be extinguished. When the charter expires, there is, therefore, nothing in the Act, to keep these debts alive.

And the purpose of the Act, seems only to have been, to preserve the effects of the corporation, and make them, a trust fund for its creditors first, and next, for its stockholders. To such an Act, there could be little constitutional objection by the corporation, itself, as such an Act would be better, perhaps, for the corporation, than "the common law rule." But, when it comes to the stockholders, the case is different. By the terms of the charter, as it was when they accepted it, their liability was to expire on the 1st of January, 1857, for the charter itself was to expire on that day. Is it in the power of the Legislature, to prolong this liability indefinitely? The legislative interference in the Dartmouth College case, was as nothing, to what such a legislative prolonging of this liability, would be.

Hence it was, probably, that the Legislature failed to make the Act extend to the debt, or liability, of stockholders. Indeed, if the language used by the Legislature, were doubtful, here would be reason enough, to require us, to give the benefit of the doubt, to the construction, that would make the language fall short of this debt or liability.

There is yet another reason, quite sufficient, to make *me* think, that the Act does not apply.

The *judgment of forfeiture*, in my opinion, *totally* dissolved the bank. A part of that judgment, was, "that the liberties, privileges, and franchises, to-wit, those *of being a body politic and corporate*, be seized into the hands of the State." If this did not dissolve the bank, what judgment could?

It is true, that in this particular, the judgment exceeded the directions given in the Act of 1842, but still, the case was one in which, the Court had jurisdiction, and when that is so, a Court's judgment though erroneous, must stand, until set aside. This is an every-day principle. Indeed, the Court, as I have heard, deliberately disregarded the direction in the Act of 1842, holding such direction unconstitutional—and, of set purpose, made the judgment, one of general and total dissolution. The error, then, if it is an error, I consider to stand on the same footing as the thousands of errors brought to this Court for correction, which, until reversed bind. See my opinion in *Robison vs. Lane*, 19 *Ga. R.* 396.

This judgment, then, as I think, totally dissolved the bank.

This judgment was rendered in 1843, twelve years before the Act of 1855, was passed.

Now, that Act, by its terms, only applies to dissolutions "from and after the passage of" the Act. The Act therefore, by its terms, does not apply to the dissolution of this bank in 1843.

I said in a previous part of this opinion, that I would here give my reason for thinking, that this Act of 1855, did not save the debts of even the bank itself, from extinguishment. I have now given that reason. The debts were extinguished long before that Act was passed—were extinguished by this judgment of dissolution, rendered in 1843. In that consists my reason.

[7.] Upon the whole, then, the conclusion to which I come, is, that the Court below should, as requested, have told the jury, that, with the expiration of this charter; expired, the liability of the stockholders.*

Judgment reversed.

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*In answer to the objections made to my presiding in this case, I refer to my opinion in *Lane vs. Morris*, 16 *Ga. Rep. p.* 248.

McDonald J. concurring.

This cause comes to this Court on many assignments of error. The judgment is reversed on one of the assignments only, and that being fatal to the case of defendant in error, who was plaintiff in the Court below, other grounds which had not been affirmed, were not considered by us. Some of them were not insisted on by counsel for plaintiff in error.

The counsel for defendant in the Court below requested the Court to charge the jury, that, if the charter of the Planters and Mechanics Bank expired by its own limitation, on the 1st of January, 1857, such expiration extinguished the plaintiff's debt, and that he cannot recover. The Court refused to give this request of counsel in charge to the jury, and the defendant assigned error on that refusal. A majority of the Court are of opinion that the request ought to have been given in charge to the jury, and, on that ground, reverse the judgment of the Court below. As a member of the Court dissents from the judgment rendered, it becomes my duty to deliver my opinion in writing, assigning my reasons for concurring in that judgment.

It is insisted that it has already been decided by this Court, that the personal liability of the stockholders in the Planters and Mechanics Bank of Columbus, survives the dissolution of the corporation, and that it is no longer an open question; that the doctrine of "*stare decisis*" requires that that adjudication should be implicitly followed, and that it cannot now be called in question.

In the case of *Cain and Morris vs. Monroe*, 23 *Ga.* 87, I expressed my opinion on that argument. I there said it was the duty of an appellate Court, of the highest obligation, if by its decision, it has established, as law, that which, it becomes satisfied, is not law, to annul its error, &c. Such Courts are established, not to make, but to expound the law. If, in any case, it decides contrary to law, it substitutes error for law in that particular case, and if it adheres to it in subsequent cases, it establishes error as law. That would be a strange morality which would palliate error, and commend a perseverance in it, while it condemned a correction of it.

If it be allowable to maintain an erroneous exposition of the law, it is when it has gone forth with such authority, and has been of such standing, that the community, in all probability, have regulated their conduct and contracts by it. In such cases the Court having the power of reversal ought to weigh well the consequences before it interferes, for if more mischief than good is to result from a change, and the error in the former adjudication is not most manifest and clear, it had better stand, however strong the inclination of the Judge's mind may be against it. No case precisely like the one now before us has ever been before this Court. The cases approaching it most nearly are *Moultrie et al. vs. Smiley*, 16 *Ga. Rep.* 289, and the case of *Moultrie et al. vs. Hoge*, 21 *Ga. Rep.* 513. These suits were both against directors of the Commercial Bank at Macon, for excessive issues of bank notes, during their directory, for which excess the charter made them liable. The charter expired during the pendency of the actions, and that matter was pleaded in the first action as an extinguishment of the demand, which plea was stricken out by the Court, and error was assigned thereon.

In the latter action, counsel for the defendant requested the Court to give in charge to the jury, the expiration of the charter, as an extinguishment of the plaintiff's demand. The Court refused so to charge, and error was assigned thereon. In the case of *Moultrie vs. Smiley* the judgment was affirmed. In the case of *Moultrie vs. Hoge* the judgment was reversed, overruling the other case. Those were cases against directors, and this is a case against a stockholder. There is a slight difference in the cases. If they were precisely parallel, the decision in the latter of the two cases would be a decision on the identical point now under consideration, and would render the assignment of reasons for the judgment in this case unnecessary. The cases which have been passed upon by this Court, in regard to the stockholders' liability under the charter of the Planters and Mechanics Bank of Columbus, after the judgment of forfeiture of the charter of that bank, cannot be considered as authority beyond the points made in the record, and the decision thereof. It was insisted in those cases, that by that judgment of forfeiture, the corporation was dissolved, and the debts were thereby extinguished, and could not be collected from the stockholders. The Court decided that the remedy of the billholder against the stockholder, survived the dissolution of the corporation, and that he might assert it both before and after its *final* dissolution. The language of the Court goes beyond the case made in the record, and would include a case of dissolution by the expiration of the corporation by its own limitation. It cannot be authority beyond the point the Court was called on to decide. *Thornton vs. Lane*, 11 *Ga. R.* 501.

I shall hereafter express my opinion of the difference of effect upon the corporation, its property and debts, between the judgment of forfeiture and a dissolution by the expiration of the charter.

Suffice it to say, now, that the decisions of this Court on this point, have not been made on the effect of a dissolution of the corporation by the expiration of the charter on the individual liability of its stockholders, but on the effect of the judgment of forfeiture of the charter on that liability.

I will now proceed to the consideration of the case as made in this record. The suit is on the charter. The plaintiff sets forth the provisions of the charter in respect to the liability of stockholders, alleges that he is a billholder, that he has sued and recovered judgment against the bank on the said notes, that he has had executions issued thereon, that the Sheriff has returned them "*nulla bona*," and that an action has accrued to him against the defendant as a stockholder in said bank, &c. The charter has expired, and there is no provision therein for continuing the liability of the corporation or its stockholders, beyond the period of its existence.

Charters in this State are Acts of the Legislature, and when they fix a limit to the corporation which they create, they are necessarily temporary Acts, and unless they contain provisions for the continuance of their obligations, contracts and remedies, &c., after they cease to operate substantially for the purposes for which they were created, all the consequences ensue, which follow the dissolution of a corporation, at common law.

The Acts creating the Planters and Mechanics Bank of Columbus, declared that it should continue until the first day of January, 1857.

By the 11th section it is enacted, that "the persons and property of the stockholders shall be pledged and held bound in proportion to the amount of shares, and the value thereof, that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by the said bank, in the same manner as in common actions of debt, and no stockholder shall be relieved from said liability by sale of his stock, until he shall have caused to have been given, sixty days notice in some public gazette in this State.". The charter does not declare that this liability shall extend beyond the expiration of the charter, as fixed in the Act of incorporation. Shall it be so extended by the interpretation of the Act? If there be nothing in the Act to justify it, I do not feel warranted in so expounding it. This is not the case of the construction of an Act of the Legislature, according to its reasons and spirit. That happens when a question arises whether a particular case falls within the reason and spirit of a statute, which is unquestionably in existence, and of full force and obligation, as to cases falling within its letter. But the point here is, whether a temporary statute can be extended beyond the limit of its existence; and if some temporary statutes may be so extended, whether the statute under consideration is one of that description. It is as well settled as any principle in the books, that if a penal statute be repealed, or expire by its own limitation, a person offending against its provision cannot be prosecuted and punished, unless there be some provision made in that or some other statute, authorizing it. If judicial proceedings be begun under the Act, they cannot be pursued. 1 *Kent Com.* 465, *and notes; The Bank of St. Marys vs. The State*, 12 *Ga.* 575. So well is the principle understood in England, that Parliament expressly enacts sometimes, that the statute shall continue in force after it has ceased to operate substantially, for the purpose of supporting prosecutions against those who may have violated it during its existence. 9 *Bac. Ab. new ed.* 223. There must be a reason for this rule, and the most satisfactory one is, that at the time of enforcing a right claimed under it, there is no law statute or common, to sustain it. If a statute giving a new right, creating a new liability, or imposing penalties for acts before innocent, expire or be repealed before the right becomes completely vested, the liability established and perfected by the final judgment of a Court, (and the same in regard to the prosecution for penalties,) so that the party complaining shall be compelled to resort to the repealed or expired Act to sustain his claim, there can be no law to support him. For if such an Act be repealed or expire, it is precisely in such cases as if there had never been such an Act. The case must fail.

The case of *Stevenson vs. Oliver*, 8 *Messon & Wellsby*, 235, furnishes an instance of a completely vested right under a tempory statute. That was an action on an apothecary's bill. The defense was, that the plaintiff was not a qualified apothecary under the statute, and could not therefore recover for services rendered. The plaintiff relied, for his authority to practice, on a warrant as assistant surgeon in the navy, which he held on the 9th of September, 1825. That, he contended, was sufficient under the statute of 6 *Ga.* 4 *c.* 133, *sec.* 4, which enacted that any person holding such warrant in the navy, army, &c., should be entitled to practice as an apothecary, &c. Against this, it was said he could practice but one year, as the 11th section of the statute enacted, "that this statute shall take effect from and after the passing thereof, and shall continue until the 1st day of August next, in the year 1826." It was held that although the Act was temporary, the right acquired under it was not; that the apothecary acquired a perfect right. By the Act, the right became perfect, and in suing for his apothecary's bill, all he had to do was to show he had a warrant as assistant surgeon in the navy. All that this case establishes is, that a temporary statute may confer a perfect title. Now, if the Act had entitled the plaintiff to a warrant in the navy as assistant surgeon, on certain terms prescribed in the Act, which he insisted he had complied with, and the persons having authority to deliver it to him, had refused to do it, and, in the mean time, the Act had expired, he could not have enforced the delivery, however unjustly and oppressively he may have been treated, because the statute on which he relied to enforce his right had expired. That case proves another thing: that the Judges who decided it, considered the effect of the expiration of a statute the same in civil suits as in criminal prosecutions, though, singularly enough, they misstated the law in regard to its effect on crimes and penalties, unless there be some English statute which changes the law, as expounded by the ablest Judges in that country and in this. We may probably infer that there are such statutes, from the authority in the 9th *Bacon*, to which I have referred.

If the plaintiff's right depend on the statute, and the statute has expired as to the bank, how can it exist as to the defendant, and entitle the plaintiff to recover against him?

Without a provision to that effect in the charter, the existence of a bank cannot extend beyond the time specified in the Act of incorporation for any purpose, not even to save its debts from extinguishment, its personal effects from forfeiture, and its lands from reversion. The effect of its dissolution, according to all law, is the extinguishment of its debts. Mr. Kyd says, in his treatise on corporations, that "the effect of a dissolution of a corporation is, that all its lands revert to the donor; its privileges and franchise, are extinguished; and the members can neither recover debts which were due to the corporation, nor be charged with debts contracted by it in their natural capacities." 2 *Kyd Cor.* 516. He expresses a doubt as to what becomes of the personal estate. It is the debts, however, with which we have to deal. The principle is expressly recognized by this Court in *Hightower vs. Thorn-*

ton, 8 *Ga.* 492. Judge Lumpkin in delivering the opinion of the Court expresses himself thus. "Upon the threshold of this discussion, we are met with the common law principle: That upon the dissolution of a corporation the debts due to, and from it, are extinguished. A doctrine which results, necessarily, from the fact that the corporation having expired, whether by its own limitation, by surrender, abandonment of its members, or judgment of dissolution, there is no one in law to sue or be sued."

Again in *Thornton vs. Lane* the same learned Judge delivering the opinion of the Court remarked, "why so much time and talent, labor and learning have been employed to establish a proposition which nobody denies," viz: "That the debts of a corporation, either to or from it, are extinguished by its dissolution, I am at a loss to comprehend. Certain it is, it was recognized by this Court at this place, more than two years ago, as it had been on more than one occasion previously." There is nothing in the charter of this bank to avert these consequences on its dissolution by its expiration. It was the law of the bank on the day it was organized, and if no subsequent act saves the debts from extinction, hey are gone to all intents and purposes. However unreasonable and unjust it may be, such is the law, and those who administer it are bound so to expound it. Such was the effect of the expiration of the charter upon the debts of the bank, so far as the bank as a corporate body is concerned. It follows as a sequence that the liability of the stockholders for the debts is gone also, unless the statute declare otherwise, because the debt being extinct as to the bank which is principal, must be extinct as to the stockholder also, whose liability is secondary; and if it be a mere statutory liability, without reference to a contract of any sort, the liability must cease with the statute by which alone it had an existence. This Court has held it to be a statutory liability, and not created by contract either expressed or implied. *Lane vs. Morris*, 10 *Ga. R.* 164; *Thornton vs. Lane*, 11 *Ga. R.* 497. There is nothing in the statute which, by any legitimate rule of construction, could be held to extend the liability of the stockholder, beyond that of the bank. There is nothing in the 11th section of the Act which points to it, but the contrary, for it declares that the stockholder shall not be relieved of his liability by sale of his stock. There can be no sale of stock after the expiration of the charter, for there can be no stock in a dead corporation. The 16th section of the Act looks to the failure of the bank, and not to its dissolution. The stockholders who may have sold their stock within six months prior to its failure are held liable. The whole section contemplates an existing, but insolvent bank, one unable to pay its debt. This Court has given a construction to the terms "ultimate liability" as used in this charter. It means a secondary liability, neither more nor less, in substance, than an endorsement in the *second instance*, by which the holder of a note is bound to prosecute the maker to a *prima facie* case of legal insolvency only, or to assign some satisfactory excuse "for not doing so." *Thornton vs. Lane*, 11 *Ga. R.* 517.

Such is the meaning affixed to the terms "ultimate liability." Upon that construction of them is the plaintiff now proceeding. It does not mean in this charter, that the stockholders shall be liable to redeem such notes as are in circulation after the expiration of the charter. If so, the suit in this case could not have been instituted until after that time. This Court has held that the remedy may be pursued after the judgment of forfeiture, but it has not decided that it could be pursued after the expiration of the law. The judgment of the Court, was upon the effect of the judgment of forfeiture upon the debts, and it is true the Court said, that the remedy against stockholders might be pursued after the *final* dissolution of the corporation which would include a dissolution by the expiration of the charter, but that was *not* the judgment of the Court, because the record did not make the point. *Thornton vs. Lane*, 11 *Ga. R.* 496.

It could not have made it, for the charter had not then expired. Now there is a difference between the effect of the judgment of forfeiture rendered against this bank, and the expiration of the charter. At the expiration of the charter, the corporate body *was dissolved.* By the judgment of forfeiture *it was not.* I expressed my opinion pretty fully on the effect of the judgment of forfeiture in the case of *Robison vs Lane*, 19 *Ga. R.* 360. That judgment, as I then said, "did not annul the charter, and amounted to no more than a judgment of seizure of the liberties, franchises, &c. into the hands of the State, and that the "*bank*" be prohibited from using any of the franchises, &c. conferred on the grantees in the charter, and from intermeddling therewith." If it did not dissolve the corporation, the debts did not become extinct, it left the statute in full force; the proceeding instituted against the bank for the forfeiture of the charter was an information in the nature of a writ of *quo warrantó*, and the judgment on such an information, is not a judgment of dissolution but of seizure and ouster. But if the effect of the judgment had been to dissolve and annihilate the corporate body, the Legislature protected the property, effects of all sorts, debts, obligations and contracts of the corporation, from the effects of the common law rule, by providing for their preservation, first for the creditors, next for the stockholders. The first Act of our Legislature which authorized proceedings for the forfeiture of bank charters, aimed no doubt at their annihilation, but it intended also to preserve the assets for the benefit of the creditors, for it directed them to be immediately placed in the hands of a receiver for that purpose. Without pausing to enquire whether, upon a judgment dissolving the corporation, the provisions of this Act would not have saved the debts from extinguishment, I will say that prior to the judgment of forfeiture, relied on, in this case, which was pronounced in 1843, the Legislature passed an Act declaring that the judgment should dissolve the corporation for all purposes whatsoever, saving and excepting as to its power, in its corporate name, to collect and pay its debts," &c. &c. The Judge was directed to incorporate the exception in his judgment, and although he did not do it, the judgment which he did pronounce, being a judgment of seizure only, as I have elsewhere shown, had precisely the same effect and no greater. *Robison vs. Lane*, 19 *Ga. R.* 360. It was not a judgment of dissolution and did not extinguish the debts, and I so said in that case. It certainly did not put an end to the unexpired charter and therefore left the law of full force against the stockholder. As long as the Act existed his liability remained. But the charter expiring, the law expired, and being one and entire, passed for a single purpose, the whole Act expired, there being no expression in it to keep it alive for any purpose.

But there is a view to be presented of this demand regarded as a statutory liability only, which would aid much in the construction of the charter, if there were anything ambiguous in it to construe. In the charters of several of the banks of this State, in which the stockholders are made individually liable, it is declared that the persons and property of the stockholders shall, *at all times*, be pledged and bound for the *ultimate* redemption of all notes or bills issued, &c. Here the terms "at all times" and "ultimate," are used, one fixing the nature of the liability, and the other, its duration. Considering these charters as mere statutes, disconnected from the idea of *contract*, it follows that when the statute declares that the persons and property of the stockholders shall *be at all times* bound and pledged for the ultimate redemption of notes, &c., there can be no limit in point of time, on the liability of the stockholders, for by positive enactment it is continued to the future indefinitely.

But in charters where the words "at all times" do not occur, the statutes do not create a perpetual liability, but that matter is left to the control of the common law.

Hence the words "at all times" not appearing in the charter of the Planter's and Mechanics' Bank of Columbus, it follows that that statute has no effect to extend the liability beyond the time at which, according to the principle of the common law, it would end. I have already shown that according to these principles it ends with the expiration of the charter. This Court has decided, as already remarked, a case, *Moultrie et al. vs. Hoge*, 21 *Ga. R.* 513, but slightly differing from the one before us. The difference is in the *facts* of the case, rather than in *principle*. That was an action against the directors for an excessive issue of bank notes happening during their administration. The provision in the charter was extraordinary, as it made directors who were absent, or who being present dissented from the resolution or act by which the excess was created, equally liable with those on whom the responsibility rested. The charter prescribed the remedy; an action of debt. It declared that the liability imposed on the directors should not exempt the corporation or its property from being also liable for and chargeable with the excess. The same charter enacted that the persons and property of the stockholders should, *at all times*, be pledged and bound for the ultimate redemption of their notes, &c. There is no enactment that the directors should be *at all times* liable. We held in that case that the liability of the directors expired with the charter. Sickness prevented my writing out my opinion concurring in the judgment pronounced in that case. The Courts cannot enforce a right which has no foundation except in the defunct provisions of an expired statute. The statute incorporating the Planter's and Mechanics' Bank of Columbus, having expired, and there being no provision in that or any other statute for continuing the liability of the defendant as a stockholder, if his liability were statutory entirely, it ceased with the expiration of the statute and cannot be enforced.

I will now proceed to examine the charter as a contract, and ascertain the defendant's liability in that aspect of the case. In England private acts of Parliament are regarded in the light of contracts made by the Legislature on behalf of every person interested in anything to be done under them. *Dwarris on Stat.*, 651. Whether an act is public or private, does not depend on its having a clause declaring it a public act, but upon the nature and substance of the case. *Ib.* In this country acts of incorporation have been decided by the highest authority to be contracts, and contracts of such obligation and force that the Legislature can neither repeal or modify them unless the power to do so be reserved in them. In England, Parliament has that power, and exercises it on proper occasions, whether the charter of incorporation proceed from the crown or from Parliament. The corporations accept their charters, subject to this power in Parliament, and the law, therefore, in this respect enters into all such contracts and makes a part of them.

It is probably a misfortune that any other decision was ever made in this country. All charters in this country are by Legislative acts, but they are nevertheless contracts.

The charter now under consideration was a contract. But the mere passing the act of incorporation did not make it a contract, although the names of certain persons were inserted therein as corporators. It was the subscription to the stock, or the acceptance of the charter which made it a contract; and, in determining upon that, each person acted on his own judgment, and is bound by the contract as he made it. It is to be construed by the words, like all other contracts, according to the intention of both parties. That one of the parties is the Legislature does not vary the rule of construction, nor does it give one party any greater power over the contract to add to its terms in any respect, than if both the contracting parties were persons. And the same may be said, if the contract be made in reference to an Act of the Legislature. The change of that Act cannot add to the obligation of either party. Those principles were acted on in the case of the *Union Bank of Maryland vs. Ridgly.* That was a suit by the plaintiff against the defendant as one of the sureties in the bond of Ralph Higginbottom, as cashier of the bank. The bank was chartered by the Legislature of Maryland in the year 1804. The Act was to continue in force until the expiration of the year eighteen hundred and fifteen, and until the end of the next session of the Assembly thereafter. Ralph Higginbottom was appointed cashier on the first day of March, 1805.

On the 30th day of March, 1805, he gave the bond and continued to be cashier and act in the capacity of cashier until the 25th day of May, 1819. In 1815 the Legislature extended the charter to the 12th day of January, 1835. Several breaches of the bond were assigned, such as embezzlement, false discountings, &c., by Higginbottom as cashier, extending down to the 25th day of May, 1819. It was contended that the bond was only co-extensive with the original Act of incorporation, which expired on the 6th February, 1817, being the end of the session of the Assembly next after the expiration of the year eighteen hundred and fifteen, and that the defendant was not liable for violations of the condition which took place after the expiration of the original charter. The Court in that case said that, in construing the bond, they must look to the intention of the parties at the time it was executed; that the intention, when ascertained, must govern the contract of the parties. "When the bond was executed, then, the Act of incorporation under which it was given was limited in its duration to the 6th of February, 1817. The bond looked to the time for which Higginbottom was appointed, and that was restricted by the limitation of the charter as it then stood. What then was the intention of the parties? and where is that intention to be found? Where but in the original Act of incorporation, under which the bond was executed? And looking to that Act, it would seem very clear that no responsibility was contemplated beyond the period of its duration"—there was no idea then of carrying it any further. "The parties knew the legal duration of the charter expressed upon the face of it; they contracted with a view to that duration and the contract must be expounded as the law was when the contract was made." 1 *Gill and Johnson* 324—433. Every person who examines a charter for a bank for the purpose of becoming a stockholder, no doubt, considers all its provisions well and scrutinizes none more closely than that which is to fix on him a personal liability, in certain events; and he contracts subject to the law which applies to such things. It is a rule of law that no personal liability attaches to the individual members of an aggregate corporation for the debts of the corporation. It is another rule of law that, on the dissolution of a corporation of that sort the debts due to and by it are extinguished. It is another rule of law that on the expiration of the charter of an aggregate corporation, the corporation is dissolved, unless there be a provision therein to preserve its existence beyond that period for some special object. These are the rules of the common law, but they may be changed by statute. The insertion of a clause in an Act of incorporation, that stockholders and their property shall be liable for the debts, or any part of them, of the corporation, is an improvement upon old charters for the public benefit and binds the corporator to the full extent of his undertaking. What was the undertaking of the stockholder who became a subscriber to stock in the Planters and Mechanics Bank of Columbus? How did he intend to bind himself? He intended to bind himself ratably with the other stockholders, in proportion to the amount and value of his stock for the ultimate payment of the debts of the bank, due by bill or note. This Court has held that in that respect, he construed his liability correctly. What construction did he place on the word "ultimate?" He ought to have construed it as this Court has construed it, as a *secondary liability*. The plaintiff in this case has construed it in the same way, for he has instituted suit against the bank; he has obtained judgment, and had execution issued against the bank; on that execution the sheriff has made the return of "no property," and on these premises the plaintiff avers that an action hath accrued to him to have the amount sued for, from the defendant. That construction is right also. If this construction be right, then, the notes or bills issued by the bank and now sued on, were debts due by the bank during its existence. The notes constituted the principal debt and the bank was the principal debtor. The personal undertaking of the stockholder in the 11th section of the charter was accessory to it. According to one of the rules of law stated by me above, the debts due by the bank, would have become extinguished at the expiration of the charter, the law remaining unaltered. The extinction of the principal obligation, necessarily induces that of the accessory. It is of the nature of an accessory obligation that it cannot exist without its principal. *Evans' Poth. on Ob.* 209. This rule of the French law applies certainly to sureties proper; but it is the common sense of all accessory obligations, and Mr. Chitty says it has its full influence in the English Courts. But the stockholder by agreement, might extend the duration of his accessory obligation beyond the period at which the principal obligation would become extinct. But the charter which is his contract, is not to be so construed unless there is some expression therein which authorizes the inference of such intention.

It cannot be inferred from the fact that the corporation being an artificial person, the debt is necessarily extinguished against it, there being nothing in the charter to prevent that effect by its dissolution, but that he being a natural person is capable of being sued. Nothing but a contract express or implied that these debts should remain debts against him can authorize their recovery from him, after they have become extinct, as to the party primarily liable. There is no express contract certainly to that effect. It cannot be inferred from the engagement to the *ultimate* payment of the notes and bills. That word "*ultimate*" has been construed by this Court. Now what right had the subscribing stockholder to interpret that term as fixing on him a temporary liability, ending with the charter, and not a permanent liability? He was justified by a very fair rule of interpretation, and one which would seem to settle the matter very conclusively. During the session of 1836, the Legislature passed five Acts incorporating banks. The Act under consideration was one of them. Its provisions have already been stated. The stockholders could not relieve themselves from liability by the sale of their stock except by giving sixty days notice in a public gazette, and they were to be, nevertheless, liable if the bank failed within six months of the sale. The charter of the Ocmulgee Bank held the persons and property of the stockholders *for the time being*, pledged and bound for the ultimate payment of the bills and notes of the bank. As regards the duration of the ultimate liability of the stockholders, the terms of the charters, those of the Planter's and Mechanics' Bank of Columbus and the Ocmulgee Bank are the same. The charters of the Bank of Brunswick and of the Western Bank of Georgia declare that the persons and property of the stockholders shall, *at all times*, be pledged and bound in proportion to the number of dollars issued upon each of the shares, &c. &c. The Bank of St. Marys has no personal liability clause. Here were five charters for banks passed by the same Legislature. Persons desirous of vesting funds in bank stock, knowing that when they became subscribers for the stock, the charter would become their contract, would, of course, look to the provisions of each Act. In some of them they would find that, on subscription, they would become bound "*at all times*" for the ultimate redemption of the notes and bills of the banks. In others they would find that they would *not* be bound *at all times*, for their ultimate redemption. There is a difference, manifestly. The omission of the words "*at all times*" in one charter and the insertion of them in another, in reference to the same thing—the personal liability of the stockholder—certainly indicate strongly that there is to be no limit to the liability in the one case, and that in the other there is to be a restricted liability. Every man would so construe it, and would know that if he subscribed to the charter declaring that "*at all times*" he would be liable &c., he would enter into a very different contract, from that to which he would become a party by subscribing to a charter which contained no such words. The duration of a charter and of the obligations it imposes on those who make it their contract is a matter of much moment. Some men might be willing to subscribe for stock in a bank, whose charter was limited to a term of years, say to fifteen or twenty years, the end of which they might probably live to see; when they might not subscribe for stock in a bank having a permanent charter, which must necessarily survive them. They might be unwilling to leave to dis interested representatives, or young and inexperienced descendants, the duty of looking after and supervising interests which it might require the most vigilant and skillful persons to protect. The stockholders in the Planter's and Mechanics' Bank of Columbus, contracted, then, for a liability of limited duration, as the words "at all times" are not to be found in the charter, in connection with the personal liability of the stockholders, and the duration of the charter became a material part of the contract. But it is said that by the Act of December 15th, 1855, *Pamp's*, 55–56, 226, the assets of expired corporations are preserved for the creditors and stockholders, and the stockholder cannot be injured by having his liability continued. This Court is unanimously of opinion that that Act does not extend the duration of the individual liability of stockholders. That remains to be determined by the original charter. As was said in the case, in *Harris & Gills' Rep.*, already referred to, "What the contract was, at the time it was entered into, so it remains." In that case, it was said, the Act extending the duration of the charter could not enlarge the liability of the defendant without his consent. The principle is incontestable that the terms of a contract cannot be altered without the consent of the parties to it. They are respectively the only judges of the effect of a change, and it cannot be made without their consent. The Act of '55 does not propose to extend the duration of the charters, but only to preserve the real and personal estate and assets of all descriptions from the effects of the common law rule of reversion, forfeiture, and extinction. It was on the principle I have been discussing that it was decided, in the case of the *Hartford & New Haven Railroad Company vs. Croswell*, 5. *Hill's Rep.* 287, that a company incorporated for a particular object, cannot be authorized to engage in any other and new enterprise, so as to bind a stockholder, without his assent. The subscriber in the original company is regarded as having vested his money in a particular enterprise, and neither the Legislature nor the company have the right to divert it from that object and apply it to other purposes without his assent.

The case cited from the Maryland reports was the case of a surety, and the liability of a surety is "*stricti juris,*" but the cardinal rule for expounding his contract is the same as that for expounding any other contract—the intention of the parties; and I referred to that case for the purpose only of showing the rule and its application to cases, where statutes affect contracts. In many of the cases, heretofore decided, stockholders have been referred to as sureties, and if that be the correct light in which they should be viewed, the law of sureties should be applied to them. I am not disposed to consider them as strictly sureties, for a surety is not interested in the consideration of the contract. Every stockholder in this bank is interested in the consideration. My brothers, LUMPKIN and BENNING, have both expressed the opinion that they are sureties; but the former in a more recent opinion, has questioned the propriety of so considering them. In one view of the case, however, we are all agreed: that the liability is secondary and that is their contract. The Legislative construction is the same. By the Act of 1841, "to facilitate the collection of debts from incorporations and the stockholders thereof" an execution could not be issued against stockholders, until an execution had been first sued out against the corporation and a return of "no corporate property to be found" had been made thereon by the proper officers. *Cobb* 541.

There being nothing in the charter of the Planters and Mechanics Bank of Columbus, to continue any of its powers or faculties, or to authorize the Legislature to continue them, without the assent of the stockholders, so as to prolong or perpetuate their personal liabilities, after the expiration of the charter, no Act of the General Assembly, however efficacious it may be, to save the property and effects of expired corporations for the benefit of their creditors and stockholders, can extend the duration of the personal liability of stockholders, without their consent, beyond the period, at which, according to the stipulations of the charter it was to end. Whether the stockholders are to be viewed as principals or sureties in the contract, the Legislature can not add to the terms of their obligation, without their consent, stipulations which did not belong to it when it was entered into. If by the charter as it was passed, the debts of the bank according to the existing law, would have become extinct on its expiration; and the stockholders being only secondarily liable, whether as sureties or not, the debt could not have been recovered against them; except by express agreement, or one so strongly implied that the intention to be bound, could not be mistaken; the passing of a subsequent Act to preserve the debt from the effects of the then existing law as against the bank, cannot superadd terms to the stockholder's contract. That stands as it was when entered into. As was truly said in the opinion of the Court, delivered in the case of *Mumma vs. The Potomac Company*, 8 *Pet.* 281, "every creditor must be presumed to understand the nature and incidents of such a body politic," (a corporation,) "and contract with reference to them." That the creditor does not understand the contract, is no reason, in law for the Courts to change or modify it, to conform to his notions of it. It must stand as the parties made it. Cases in New York have been referred to as establishing the right to continue suits against the stockholders, on individual liability stipulations, or laws, after the dissolution of corporations. Their authority rests upon a New York statute which is not of force here. By that statute the individual liability commences at the dissolution of the corporation. In this case the individual liability ends with its dissolution. It was not the law in New York, that such a liability survived the dissolution, until the Legislature of that State passed the Act. It cannot be law here until the Legislature of Georgia passes a similar Act; unless it makes such liability a part of the Act of incorporation when passed, as it has done in some instances, by declaring that the stockholders shall "at all times be liable." One inconvenience, indeed injustice, may result to creditors by the protraction of suits against stockholders, commenced in time, but kept in Court by defenses until the expiration of the charter. That is the fault of the law, and it ought to be amended. Every man who is sued, is entitled to make his defense, but the law ought not to permit the mere persistence in a defense to produce a lapse of right; but at the same time care should be taken to prevent the gross injustice of continuing a remedy against a party secondarily liable, without affording him the means of redress against the party primarily liable. There has been no adjudication of a case under one of the charters which declares that the stockholders shall at all times, be liable, but it is by no means clear that the Courts would not be bound to construe the charter as saving the remedies against the stockholders and holding the corporate assets liable, while for all other purposes, the corporation was dissolved. It is time enough, however, to consider that question when it arises. As unjust as the law is, which admits a defendant's protracted defense to defeat the plaintiff's right, after incurring expenses, under a public law, in prosecuting it, it is unquestionable law and has been enforced always. In the case of *Yeaton vs. The United States*, 8 *Cranch's Reps.* 281, Chief Justice

Marshall, delivering the opinion of the Court, said "it has long been settled that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some provision be made for that purpose, by statute." Congress had passed an Act (on the 28th Feb. 1806,) prohibiting intercourse with certain parts of the island of St. Domingo. The Act was limited to one year. By an Act of Feb. 1807, it was continued until the end of the next session of Congress which expired on the 26th April, 1808. The schooner General Pinckney was libelled on the 6th Jan. 1807, for a violation of that Act, and condemned in the District Court on the 23d of July following, which condemnation was affirmed in the Circuit Court on the 7th of Nov. From that sentence the claimants appealed to the Supreme Court of the United States on the 1st Monday in Feb. 1808, where the cause was continued until Feb. Term, 1809. On the ground that the statute had expired, before the hearing in the Supreme Court of the United States, the whole cause having been brought up by appeal, unaffected by the condemnation, and there being no law then upon which the cause could be tried, the judgment of the Court below was reversed. The same decision, was made in the case of the schooner *Rachel vs. The United States*, after the sentence of condemnation was passed, and the vessel sold, and the proceeds paid over to the United States, while the Act on which the condemnation was pronounced was in force. The Act having expired before the cause was tried in the Supreme Court, that Court made an order for the restitution of the property to the claimant. 6 *Cranch's Reps.* 329. These were cases on penal statutes, public, not private Acts, and having nothing in the nature of contract about them, and are referred to simply as cases which show that Courts cannot extend a law after its expiration, to enforce a right to which the party became entitled under it, during its existence, although the case was delayed by a protracted defense. The conclusion then, ot which I have come is, that the charter having expired, the right of the plaintiff in the Court below to pursue the defendant in this case, expired with it:

That he contracted that liability in reference to the law, which at the time of subscription, would have extinguished the debts sued on, at the expiration of the charter, as the debts of the bank, the party primarily liable:

That the debts being extinguished as the debt of the party primarily liable, they would be extinguished as the debts of the party secondarily liable also:

That such being the contract of the party, no Act of the Legislature, subsequently passed, could vary it and extend the duration of his liability without his consent:

The Act of 1855, by changing the rule of the common law, in respect to the assets of dissolved corporations, did not convert the liability of the defendant, which by contract was limited in point of time, into a perpetual liability. That the defendant was transferee of the stock on which he is sought to be held liable does not vary the case, as the suit was instituted prior to the passing of the Act of 1855, and the transfer must of course, have preceded the suit. But I am not to be understood as holding, that if the defendant had taken the transfer of the stock subsequent to the passing of that Act, he would have been liable, and that in that respect, the contract of the original subscriber, would not have been his contract. I leave that question open.

I think therefore, that the request to charge the jury, as made by the counsel for the plaintiff in error in respect to the effect of the expiration of the charter on the debts sued on, ought to have been given by the Court, and that because of the refusal of the Court so to charge, the judgment of the Court below ought to be reversed. This decision is put on the ground herein stated, and not on the ground that for no cause can a stockholder in a bank or other corporation be sued after the expiration of its charter, or after its dissolution otherwise. All deceitful practices by which others are defrauded are condemned by the common law, and a party injured by such practices is afforded a remedy by the common law. But in this action the party defendant is not charged with fraud, and is not called to defend himself against such charge. From evidence delivered in other cases which have been reviewed before this Court, it is most manifest that the greatest frauds were committed in the organization of this bank, and in putting it in operation, by which billholders and other creditors, have been greatly damnified, and for which they are entitled to redress, whether the corporation has been dissolved or not. This liability depends, in no manner, upon a provision in the charter, but on other principles. Persons may be liable, in my judgment, even if they have been crafty enough, after committing a participation in the fraud, to sell their stock, and to relieve themselves from either statutory liability or personal liability, under the charter as their personal contract, by whatever name it may be called, by giving all notices, &c., necessary to secure their exemption from personal liability under their charter. If this fraud has contributed to the failure of the bank, or to depreciate in value a currency which they were authorized by law to substitute for coin, they are liable at common law, in the proper forum, to an injured party for the consequences. When a bank is chartered, organized, and proceeds to issue notes of circulation, the community have a right to presume that every thing has been done which is required by the charter to ensure their permanent credit, their safety and soundness as a currency. They have a right to presume also, that after it goes into operation, nothing will be done inconsistent with honesty and good faith to impair their credit and value. They have a right to presume that no part of the capital will be withdrawn by the stockholders who are not entitled to it, or any part of it, until creditors are paid, for whose benefit it was required to be paid in the first instance. When what ought to be done is not done, or what onght not to be done is done, and creditors are injured thereby, they are entitled to redress from those at whose hands the injury was sustained, let it be called by whatever name—violations of duty, breach of trust, or fraud. In whatever light it is considered, it is a personal wrong and injustice to those who suffer, not dependant on any charter regulations for remedy, and for which those at fault are liable. If stockholders and officers of banks do their duty, it is impossible for a bank to fail. If, in the first instance, they pay in specie the amount required to be paid, and allow it to remain as permanent capital; if they make no excessive issues of notes of circulation; if, in discounting notes, they see that the makers and endorsers are unquestionably solvent; if they loan on such terms that, at short notice of approaching difficulties in monetary affairs, they can make all their means available; and if they never become borrowers from themselves, the holders of their notes and other creditors will always be paid. If, by omitting to perform a legal duty, or if they do an illegal act, by which creditors are injured, there can be no question but they may be proceeded against in a manner, and by a proceeding, that will compel those to account who have done the wrong, and at once give relief to all entitled to it, who will come in and aid the suit. A Court of Chancery, on a bill of that sort, can so regulate its proceedings, and adjust the rights and liabilities of the parties, by its decree, as to do ample justice to all, and compel individuals to account for frauds and wrongs, who have dishonestly abused the privileges granted a corporation, of which they were members, by fraud, to enrich themselves. All may be joined as plaintiffs, who are interested in the investigation; all may be made defendants who are liable to respond; and if, by the dissolution of the corporation during the pendency of the suit, the law terminates the liability of any of the parties, the suit may proceed against those whose liability arises from their wrongs or frauds, and against whom there is a remedy as old as the common law.

Note by Judge McDonald.

In the year 1852, the counsel for the plaintiff in error, sent me a copy of the argument which he had prepared in this and other cases, as I supposed, involving the points made in the record in this case, and did me the honor to ask my opinion on them, which I gave him in a letter hastily written. Among the points on which I gave him my opinion, was the effect of the statute of limitations on suits against stockholders in the bank. Before the case in which the foregoing opinion is delivered, was reached on the docket, the counsel for the defendant in error placed in my hands a copy of that part of the letter above alluded to, which applied to the statute of limitations. When the cause was called for argument, he made a motion in open Court that I would not preside. I declined presiding on two grounds: 1st. Because I had, in that letter, given an opinion very fully, on one of the points in the record, and which opinion I considered as having been given in each and every case against stockholders of that bank, to which it applied, and was therefore within the spirit of the rule on which every member of the Court had acted since the organization of the Court, to-wit: if he had been employed in a particular cause, when at the bar, he would not preside in that cause, if carried to the Supreme Court by writ of error. I had not been employed in any of the cases, and for that reason, it was insisted that I should preside; but if the reason be a good one, which would render it proper that a Judge who had been, when an attorney, employed in a particular cause, and had advocated a principle, not because it was his opinion, but because it was necessary to the success of his case, should withdraw, if that cause was carried to the Supreme Court, and not preside when it was heard, it was more proper that a Judge should not preside, whose opinion, while at the bar, had been given under no such influence.

2d. Because it might give rise to a practice of seeking the opinion of legal gentlemen in particular cases; that the party asking it, might use his exertions to place the gentleman who gave it, in a position where that opinion might benefit him. A Judge should discountenance, by as efficient means as are in his power, a course of this sort; and none seemed to me to be so effectual and proper, as to decline presiding, if promoted to the bench, in cases in which his opinion had been sought when at the bar. I will remark, that I consider the counsel who sought my opinion in these cases, incapable of acting from a motive of that sort.

After I had declined presiding in the case, a proposition was made in open Court, that I should preside with my brother Judges and hear the cause, on all points except the statute of limitations, the point on which I had expressed an opinion. It was assented to, and I did preside. Since the decision of the cause, I have received a letter from the counsel for the defendant in error, in which he states, in substance, that he is satisfied that Col. Hines Holt has in his possession my written opinion on the question of the extinguishment of the debts of a corporation on its dissolution, obtained at the same time, and in the same manner, as was my opinion on the question of the statute of limitations, and which in my judgment had rendered me incompetent to preside in this case. He did not know, at the time, that such was the fact, and supposed that it had escaped my recollection. He had made an unsuccessful effort to obtain a copy of the opinion, that he might communicate it to me. On receiving that letter, I immediately wrote to Col. Holt, saying to him he had my full permission to communicate to Col. Dougherty, or any one else, whatever I had written or said to him in relation to the bank cases. I requested him to furnish me with the originals or copies of all writings of mine, whether letters or other things, which he had or could control, containing any matter or thing relative to the said cases. He sent me the letter from which Col. Dougherty had made the extract, which he placed in my hands, at Court, as the only writing he ever had from me on the subject. Col. Dougherty requested me, that, on obtaining from Col. Holt a copy of the opinion which I had given, if it should be such an one as it was understood to be, I would conform, as far as I could now do so, to the course pursued by me on the question of the statute of limitations. He was aware that the particular judgment was reversed, but he suggested, that, if I thought proper to do so, I could limit its effect to that case; and that by adhering to the course and the reasons given therefor, at the trial, prevent its effect on the trial of the same case and others of the like character, that I could arrest the effect of what I had held, and which is admitted universally to be wrong.

I have very fully considered this application, and the reasons assigned for the request, and I will remark, that on reading the letter which I wrote to Col. Holt, in 1852, I found it was very full on many points involved in this case, and goes beyond the expression of an opinion of the effect of the dissolution of the corporation upon the debts of the bank. I cannot comply, however, with the request of the counsel, for various reasons:

1st. Upon objection being made to my presiding at the trial, I determined, for the reasons assigned, not to preside. My resolution extended to the whole case, and I should not have presided to hear any part of it, but with the consent of counsel on both sides. The counsel for defendant in error assented. The reasons assigned for the request now made, was, that I had given a written opinion to Col. Holt, "on the question of the extinguishment of the debts of a corporation on its dissolution." On that question there is no disagreement among the members of this Court, nor in the legal profession, that I have ever heard. All concede it to be the law, that on the dissolution of a corporation its debts are extinguished.

In the next place, my judicial opinion on the precise point is given in the published report of a case decided by this Court. Such an opinion could furnish no ground of objection to my presiding, it is true; but in this case, after I had declined presiding, the counsel might have refused his assent without assigning a reason. It was not like making an objection. He gave his consent, knowing the opinion I had expressed judicially.

But I went further in my letter to Col. Holt, than to express an opinion, that on the dissolution of the corporation, the debts became extinct. "The plaintiff at law," I say in that letter, "prosecuted suits to judgment on the notes of the bank, and having failed to collect the amount, he seeks to collect the amount from the defendant at law, as a stockholder. Can he do this? He cannot, I most respectfully think." I gave no reasons for that opinion. But it was expressed, and although I had forgotten writing so full a letter on the points which I discussed, I should not have presided on the trial without the consent of all the parties. That I gave this opinion on the point, *in the manner I did*, is not, in my opinion, now that it is brought to my notice, sufficient to upset the judgment I have pronounced in this case. If so, the expression of any forgotten opinion on a case with which I had no concern as counsel, and on a point which it appeared I had not investigated, would disqualify me for presiding, if that cause should be brought before this Court. But if I had argued this point as fully as I did the statute of limitations, still I ought not to do the opposite party the injustice of yielding to the request made of me. That letter had been read before the Supreme Court, in the presence of the counsel. It was so stated in Court. That, however, was unknown to me, but it certainly put the counsel in possession of the contents of the letter. The extract with which he furnished me, is from the same letter, and I must presume that he acquainted himself with the contents of the entire letter when he made the extract. If he had forgotten it, after having seen it so much more recently than I had, with a powerful motive to remember it, it is not remarkable that it had passed wholly from my mind, who had no reason to remember it. I cannot comply with the novel request of the counsel, but leave the opinion and the judgment it was intended to support, to stand for whatever they are worth. I have not the slightest reason to question the soundness of the legal principles decided.

Columbus, Jan. 4th, 1858.

Hon. Cha's J. McDonald:

Sir: In a note to your written opinion in the case of *Beall vs. Robison*, as published in pamphlet form, giving your reasons for not complying with my request, as to limiting your judgment under the circumstances, to that particular case; I notice that you say, "that letter" (meaning the one written by yourself to Col. Holt before your election, containing your opinion in the Bank cases) "had been read before the Supreme Court in the presence of counsel. It was so stated in Court. That however was unknown to me, but certainly put counsel in possession of the contents of the letter." You of course intend to be understood by the words "in the presence of counsel," to mean in my presence. Such is not the fact. The extract, a copy of which I furnished you, was read before the Court, *but no other portion of that letter.* That part containing your opinions, that the billholder could not recover, and that his debt was extinguished, &c., was never read in my presence, before the Court or any where else. Nor was it ever stated in Court in my presence, that the letter had been so read. The manner and connection in which the statement referred to is made by you, is well calculated, and in fact, does me *very great injustice.* As to your inferences, I have nothing to say. Perhaps you have the right to draw just such as you think proper. But when you come to state the *facts* from which they are drawn, I have the right to be correctly represented.

As the opinion referred to, as is understood, is in advance of many cases decided before it; I presume it has not as yet been authoritatively published in the Reports. I have thought it proper to bring this matter to your notice, that an opportunity may be afforded you of making the necessary correction.

Yours, &c.

W. DOUGHERTY.

MARIETTA, 7th January, 1859.

Col. W. Dougherty:

I have received yours of 4th January 1858—manifestly a mistake in the date, as to the year. My recollection of the statement in Court is such as I have stated it in my published note to which you refer. My recollection is further, that you were present when it was made, just as stated. I understood the counsel as speaking of the letter, the whole letter. If I find that I am mistaken in this, I will cheerfully correct it in an additional note, and if I find there is a mere difference of recollection between us, I will in a note to the decision in the Reports, give the account you give me of it in your letter with a great deal of pleasure. I have no disposition to do you the slightest injustice. I spoke of nothing but the statement in Court, as I had no personal knowledge of the reading of the letter or any part of it, before the Court at the time referred to by the counsel.

I have the honor to be, yours, &c.

CHARLES J. McDONALD.

LUMPKIN, J. dissenting.

On the 30th day of December, 1836, the Legislature incorporated a banking company, under the name of the Planters and Mechanics Bank of Columbus. Certain persons named in the charter, with all such as might thereafter become stockholders, were made and declared to be a body politic, by the name and style aforesaid. And it was provided amongst other things, that said corporation or company should continue until the first day of January, 1857. *Prince*, 124-5.

Suit having been prosecuted to insolvency at the instance of the billholders against the corporate assets, actions were brought against the stockholders under the 11th section of the charter, to make them personally liable for the redemption of the outstanding circulation. This is one of the cases. And it is now contended, in behalf of the stockholders, that these suits must abate as to them, inasmuch as the charter has expired by its own limitation; and with it, all rights or remedies founded upon or growing out of it.

This proposition, or the principle at least involved in it, is not new in this Court. In the case of *Moultrie and others against Smiley and Neal*, 16 *Ga. Rep.* 289, the same question was made, and argued with a degree of learning and ability proportionate to its importance, and worthy of the high reputation of the eminent counsel engaged in the discussion. And after mature deliberation, this Court held, that an action brought against the directors of the Commercial Bank of Macon, to make them individually chargeable, under the personal liability clause of that charter, did not abate by the expiration of the charter, during the pendency and before the termination of the suit.

My opinion in that case occupies near forty pages of the Reports. To that, and to the concurring opinion of my brother Starnes, I refer, and reaffirm and adopt the same, (I will not re-write the argument,) without doubt or hesitation; but at the same time, with all the diffidence which the contrary judgment of my colleagues, and the magnitude of the interests involved, cannot fail to inspire. I am fully persuaded that the law, rightly interpreted, never was intended to work such gross and palpable injustice as the sanction of the doctrine, set up to screen this defendant, would establish. That this or any other bank may go on issuing bills and accumulating profits, by any and every means known to and practiced by moneyed institutions, till the day before their charter expires—the set time for which is known to nobody, or but very few—and while they hold on to all the gains they acquire, escape responsibility to redeem the currency with which they have flooded the country, so shocks, at first blush, the moral sense of any man, that to give such a construction to the Act of the Legislature, it should be written in sunbeams.

To my mind there is no obscurity in the charter of this bank. To me it has been the guiding star through all the labyrinths of the multiplied, novel, and subtle discussions which have originated under it, within the last eight years. What saith the charter? has been my constant and invariable enquiry. And to my humble understanding, it has never spoken but one language—the same that was announced first by this Court in *Lane vs. Morris*, 8 *Ga. Rep.* 476, in 1850, and which has been reiterated in every subsequent decision: and that is, that the *right* of the billholder, under the 11th section of the charter, to hold the person and property of the stockholders pledged and bound for the ultimate redemption of the bills of the bank, in proportion to the amount of his shares, and the value thereof, is one which he may assert in his own name, before or *after* the dissolution of the corporation; one which is wholly above and beyond the reach or control of any future legislation; and that this is a supplemental or superadded security for the benefit of the billholder. An able writer in one of the public gazettes insists, that the 11th section of this charter has "cut up by the roots all the common law nonsense, as to the dissolution working an extinguishment of all the debts of a corporation;" and contends, that it constitues the stockholders simply partners. And he remarks, that it is a legal novelty to hold, that upon a dissolution of a *copartnership*, its debts are thereby extinguished. In support of his position, he cites *Angel and Ames on Corporations, pp.* 478, 486, 493; 17 *Mass. Rep.* 334; 2 *Wendell*, 269; 2 *Hill's N. Y. Rep.* 269; *and* 2 *Kent's Commentaries* 316, where the Chancellor comments without disapproval of the case of *Slee and Broom*, where the Supreme Court and Court of Errors of New York held, that such corporations were mere copartnerships. And that regard to the interests of the community required that individuals, whose property thus put into a common mass enabled them to obtain credit generally, should not shelter themselves from a responsibility to which they would be held liable as members of a private association.

And I will take leave to add, that this individual liability clause, in modern charters, must it seems to me, go far to modify much of the old common law upon the subject of corporations. That the corporators, thus made personally responsible, should stand in the same relation to creditors as the individuals who compose a simple copartnership, is most obviously just.

This same writer utterly, and very properly, repudiates the idea that the stockholders are *sureties*, merely, in the restricted and legal acceptation of that term; and with it, the deduction that the discharge of the principal—the bank—is a discharge of the sureties—the stockholders. He says, and says truly, that when the stockholders are spoken of as sureties, guarantors, &c., it is a more convenient phrase to signify their *ultimate* liability. As well, he insists, may the members of common copartnerships, be called sureties, for they are not individually liable, till the partnership funds are exhausted.

"What," he asks, "is an incorporated bank separate and distinct from the stockholders? Is it not a myth, a shadow, a figment of the brain? Has it flesh, or bones, or blood? No; but it has assets and tangible property. Was it not the stockholders, through their agents, the President, Directors and Cashier, who procured these assets and this tangible property? And if these assets are missing or appropriated, do they not disappear through the same agency? Do not the stockholders claim these assets as their property? Are not all contracts made with the bank, made for the benefit of the stockholders? How absurd then to talk about stockholders being sureties for *their* bank!"

Chief Justice Bronson, anticipating that some honest

Judge might get confused with this term sureties applied to stockholders, kindly admonishes him in this wise, in pronouncing the opinion of the Supreme Court, in *Harper vs. McCulloch*, 2 *Denio's Rep.* 123; "I think the stockholders, in their individual as well as their corporate capacity, are *principal debtors.* Although they have been incorporated with many of the privileges usually granted to men associated in that form, yet the privilege of exemption from personal liability for the debts of the company, has been denied to them, and their personal liability has been expressly declared. They are thus placed in relation to the creditors of the company, upon the *same footing* as though they were an unincorporated association or *partnership.* In one respect the burden is made more onerous than it would have been in going on without a charter; for the copartners are *severally* as well as jointly liable. But that does not affect the principle; nor is it affected by another provision, that lightens the burthens, by saving the stockholders from an action, until the creditors have *attempted* to collect the money from the corporation by proceeding to a judgment and execution. The stockholders are debtors from the beginning, although the creditor has no remedy aagainst them, until he has first *tried* to collect from the company. This is no more than applying an equitable principle, which requires that the debts should be paid from the joint funds of the associates, rather than from the separate property of any of them. I think the defendant was answerable to the plaintiff, as a *principal debtor;* and consequently, that he was not discharged by giving time to the company, which he would have been, if the individual corporators are to be considered in all respects as sureties."

But it is said, that this being a statutory right, does not survive the statute. That by the charter, the bank is first liable for the payment of the bills; and that upon the failure of the bank, the stockholders are secondarily liable, under the 11th section of the charter. And it is earnestly asked, "Can it be imagined by the human mind, that the contract by the bank to pay, in the first place, is less strong, less obligatory, or less durable, than the contract with the stockholders?"

All I have to say, in answer to this position, so triumphantly assumed, is, that, in addition to the utter confusion of ideas, not to say sophistry, of endeavoring to separate the bank from the stockholders throughout this litigation—a notion so entirely demolished in the foregoing citations—I have attempted to demonstrate in *Moultrie et al. vs. Smiley and Neal*, and succeeded to my own satisfaction at least, that the debt, as against the bank itself, is said to be *extinguished*, not by any implied condition in the contract, but from necessity, because there was no person against whom it could be legally enforced. It was the reason assigned for the rule, in the *Bishop of Rochester's* case, decided in the *38th of Queen Elizabeth*—the earliest reported case upon the subject. It has been recognized and repeated in all the subsequent adjudications, from that day to this. And neither counsel, with all their vehement declamation, have been able to overthrow it; nor learned Judges, with all their research, to furnish any other.

If this be so, the interrogatories, so indignantly propounded, are pointless. For, although you are unable to sue a party *primarily* liable, because he is dead and has no representative, that is no reason why the remedy of the billholders should not be enforced against another party *secondarily* liable; and that too, whether he be a surety proper, only, or not. And especially in a case like this, where the bank and the stockholders are, in reality, one and the same, and as indivisible as the Siamese twins.

Whose fault is it but the stockholders, that their bank charter was dissolved, by judgment of forfeiture, in June, 1843? What peculiar indulgence have they upon the Courts and the country? They failed to discharge their obligations to the public; and for this default, after great forbearance, the Legislature directed their franchise to be revoked.

But this defense, which affects such a sense of outraged justice, is the more surprising, when it is recollected that the principle contended for, does not, and never did apply to the stockholders of this corporation. In this very case, there is a valid and subsisting judgment against *the bank;* and one capable of enforcement against the corporate assets, could any be found. The real estate belonging to this company, if it ever had any, never did revert to the grantor; its personal property never was seized by the State; nor was this antiquated rule of the common law ever applied in Georgia, against this or any other corporation. What has become of the large amount of available assets which belonged to this corporation—it is not necessary or proper to examine into here. Suffice it to say, the State never clutched them; and it is not pretended, that the creditors did.

But it is urged that the *Bank of St. Marys vs. The State,* 12 *Ga. Rep.* 475, decides this case. If I am capable of comprehending the simplest doctrines of the law, there is not the remotest analogy between Winter's case and this.

The Act of 1832 imposed a penalty of $100 for issuing or passing a change bill; to be recovered by suit; one-half *when recovered,* to be for the use of the State, and the other half to go to the informer. In 1851-2, before final judgment was rendered against the bank, the Act creating the offence and fixing the penalty, was expressly repealed. And this Court held, and rightly, and the informer has acquiesced in it, by failing to prosecute a writ of error to the Supreme Court of the United States to reverse the judgment, as he threatened, and was encouraged by the Court to do; *that no judgment could be awarded on the repealed statute; that the repeal prevented the imperfect right from being consummated; that it was competent for the Legislature at any time to pass such repealing act before final judgment; and that it mattered not, whether the whole penalty when recovered, is given to the public or to the prosecutor, or is divided between them.*

I trust this case, and the reasoning upon which the judgment of the Court rests, will be read; and the utter dissimilarity between that case and this, will be perceived at a glance. What vested right had P. A. Clayton, the informer, in the penalty annexed to a violation of the Act of 1832? None whatever, until reduced to final judgment. It belonged as of common right, to any citizen of the State, to institute this *qui tam action*, or prosecution. What consideration did Clayton pay for it? How different the billholder's condition. In the performance of his part of the undertaking with the stockholders of this bank, and relying upon their promise and pledge in the 11th section, to redeem the bills of their bank, if it did not, he took them for his property—his cotton —his slave—his horse. And I assert it confidently, it is not in the power of the Legislature to release them from their obligation.

In the case before us there was, in point of fact, no charter to expire by lapse of time. The charter had been terminated by a judgment of forfeiture, more than thirteen years previously; and notwithstanding this case went off upon this ground of the expiration of the charter. I cannot see how it could arise. One of the modes of dissolving a corporation is by forfeiture of its charter for an abuse of its franchises, by a judgment of a Court of Law. 2 *Kent's Com.* 305; 1 *Black. Com.* 485; *Angell & Ames on Corporations*, 648, *2d edition*; 16 *Maine Rep.* 224, 314. Now, the Act of incorporation granted to this company in 1836, having been solemnly vacated and annulled in 1843, how it survived, to die a natural death in 1857, I do not understand.

I have neither the original bill of exceptions, nor a copy, nor the Reporter's statement of the facts, before me, to enlighten me concerning this matter. Notwithstanding the dissolution in 1843, this Court has uniformly held, from the first cases in 8 *Ga. Rep's*, 468, 486, down to the case of *Adkins vs. Thornton* 18 *Ga. Rep's*, 325, that the stockholders were liable for the ultimate redemption of the outstanding circulation. How could it hold otherwise, under the Acts of 1842 and 1843? *Cobb's Dig.* 118 and 1820, as expounded by this Court, in *Robinson vs. Lane*, 19 *Ga. Rep.* 337. And if all this be so, what was there to *expire* in January, 1857? Were not the rights of the creditors, and the liabilities of the stockholders, fixed and determinable by the action of the Legislature and the Court, in 1842 and 1843? But concede that this point is legitimately presented. The Legislature grant a bank charter to a company, by accepting which they stipulate with all whom it may concern, that if you will take our bills, we bind ourselves individually to redeem them, provided the bank does not. Under this agreement, bills are emitted, circulated, and received, if you please, until the 1st day of January, 1857, when the stockholders insist the understanding is no longer binding. Very well, say the bill-holders, fulfill your contract for the past, by redeeming the bills which you have heretofore issued, and which we have taken as a part of the circulating medium of the country, in the due course of trade and business. No, we will not, respond the stockholders; our charter has run out by efflux of time! and, hence the obligation is no longer enforcible. To state the case, is to carry conviction to the conscience and bosom of all men. What if the capacity to contract cannot extend beyond the period limited by law? Does that interfere with what has already been done? Is it in the power of the Legislature to impair the obligation, already incurred, to redeem their bills? The Supreme Court of the United States, from intimations of approval already given, respecting the past decisions of this Court respecting these bank cases, would not hesitate, I feel well assured, in declaring any such attempt unconstitutional and void.

But the Legislature has been guilty of no such folly. On the contrary, by the successive Acts of 1841–42–43, it has kept alive the corporate liability itself, so far at least, as to preserve the assets for the purpose of discharging the liabilities incurred. And if it be maintained that the old [illegible] law rule of extinguishment of debts, is not founded upon the reason which I have assigned, and that is, that there is no one to sue or be sued, but upon a different principle, namely: that as the defunct corporation cannot collect the debts owing to it, that it is but equitable that it should be relieved from the payment of those which it owes; then I reply emphatically, that that reason does not exist here; for by the Acts to which I have referred, and the constitutionality of which has been uniformly affirmed by this Court, up to the present time, ample provision was made for securing and collecting the assets of this bank. 19 *Ga. Rep.* 337. And if any debtor of the bank has escaped upon the ground, that his liability was extinguished, either by the dissolution in 1843, or the expiration in January, 1857, it has never been brought to the knowledge of this Court. On the contrary, it has been again and again distinctly proclaimed, in the discussion of these bank cases, that the assignee suffered the debts to be wasted and lost, because he did not see fit, for reasons satisfactory to himself, to enforce their payment.

The principle, then, upon which the common law rule is upheld on the other side, having no foundation to stand on, in point of fact, in this case, the rule itself should not be administered.

But in addition to the Acts of 1840–41–42–43, which apply directly to the Planters and Mechanics Bank of Columbus, the Legislature, during the session of 1855–56, (*Pamphlet Acts*, 226,) passed a general law repealing, in express words, this rule of the ancient common law, and making specific provision for the collection of the assets of a defunct corporation. It was competent for the State to do this, even as it respects existing corporations: to declare that it would not seize and appropriate their property, either upon the forfeiture or expiration of their charters, but would provide for the appointment of a trustee to administer their effects, and apply the proceeds first to the payment of debts, and next to the distribution of the surplus amongst the stockholders.

Thus cutting up by the root all pretense on the part of the stockholders of this or any other corporation, to escape their individual liability; because, as has been urged, it would be unjust to hold them responsible, when the corporate assets could not be made available, which were primarily chargeable. This strikes from beneath them their last plank.

It has been intimated, that the omission of the Legislature to save the stockholders' liability by this statute, is significant of their intention not to do so. For myself, I have held from the beginning, that the security given under the 11th section of the charter, to the billholders of this bank, was beyond the reach and control of the Legislature. It was a statutory contract, which run on for twenty years from the time the right of action accrued; and so the same Legislature has declared in accordance with the law and the decisions of this Court. *(Pamphlet Acts, 233.)* And hence the General Assembly would not be guilty of an act of supererogation, by enacting that which existed to the fullest extent already, even if they were clothed with the constitutional competency to do so. But I forbear.

So numerous have been the adjudications already, upon these vexed and vexing bank questions, that it has become a matter of serious labor, as well as of embarrassment, to review them. The task would occupy a volume. I have tried faithfully, and to the best of my poor ability, to hold the scales in just equipoise, throughout this exciting and vexatious litigation. On the one hand giving to the charter that exposition which would effectuate the end for which it was granted, to-wit: security to billholders and to the public, and thereby, protection against an irredeemable paper currency. And on the other hand, shielding the members of this corporation against all suits or actions, at the instance of those who shared, or participated in any way, in the illegal, not to say fraudulent proceedings, which were had preparatory to the organization of this bank. Under the salutary doctrines which were enunciated in the case of *McDou-*

gald, adm'x, vs. Bellamy, adm'r, &c., 18 *Ga. Rep's*, 411, and to which I invite special attention, the outstanding liabilities of these stockholders have been reduced from between $220,000 and $230,000, to between $40,000 and $50,000!

Satisfied in having been fully sustained by the Legislature, as its records will show, in every important principle, which I have ruled in these cases. from the beginning down to the present time; a just reverence for what I believe to be the law, and a conscientious desire to discharge my duty, impose upon me the necessity of dissenting from the judgment rendered by a majority of the Court in this case.

UNION DRAY COMPANY, plaintiff in error, vs. JOHN M. C. REID, defendant in error.

When a company is sued on a note purporting to have been given by A. B., as Treasurer of the association, the authority to bind the company, under the Judiciary Act of 1799, must be denied on oath.

Complaint, from Muscogee. Tried before Judge BULL, May Term. 1858.

Reid sued the Union Dray Company on a note signed "M. G. McKinnie, Tr. Union Dray Co.," and offered on the trial said note in evidence, to which defendant objected.

The Court overruled the objection, and the defendant excepted, and the note was read to the jury. The plaintiff closed his case, and defendant asked the Court to charge the jury, that said defendant, having denied by plea that said note was the note of the company, the plaintiff could not recover without further proof; which the Court refused, and defendant excepted and assigns error.

R. J. Moses, by Jno. A. Jones, for plaintiff in error.

L. T. Downing, for defendant in error.

By the Court.—Lumpkin J. delivering the opinion.

Under the Judiciary Act of 1799, requiring the defendant to deny on oath an instrument of writing, upon which he is sued, the plea in this case should have been verified.

If the person who signed this note for the company, and upon which they are sued, was not authorized to make it, let them say so upon oath, and the *onus* is then on the plaintiff to overcome the plea.

Judgment affirmed.

Wm. C. Thornton, plaintiff in error, vs. Thomas A. Pass, defendant in error.

In bail cases sounding *in tort*, the sum sworn to need not be endorsed upon the back of the writ; neither is it necessary that the plaintiff should swear to any particular sum, as damages, but to the facts as to the nature and extent of the injury which he has sustained. Neither is it any objection that the sum for which the Sheriff is directed to take bail, differs from that claimed in the writ.

Motion to discharge security on bail bond, from Terrell. Decision by Judge Kiddoo, May Term, 1858.

Pass commenced his action of trespass on the case against Johnson, and laid his damages at $2,000; he made an affidavit that he had thus commenced suit, and that he apprehended the loss of said sum, or some part thereof, unless the said Johnson was held to bail. One of the Justices of the Inferior Court, under the Act of 1854, granted an order for bail in the sum of $700. On the back of the writ was endorsed, only, "Sheriff take good bail in the sum of $700." Thornton became security on Johnson's bond, and at Court moved to be discharged therefrom.

1st. Because there was endorsed on the back of the writ no sum sworn to.

2d. Because there was no sum sworn to at all in the affidavit for bail, and that without this, no bail writ could legally issue, nor could there be a legal arrest as under a bail process.

3d. Because the plaintiff, Pass, in said action, nowhere in said affidavit for bail, alleged any specific amount in which he had been endamaged, and no specific sum which he claimed to be due by reason of such damage, and that therefore, and for all these reasons, the said bail process was void.

4th. Because the sum in which the Sheriff was required to take bail of the defendant, was different from the amount sued for, and therefore, was no sufficient authority to the Sheriff to take bail.

The Court overruled the motion; whereupon, Thornton's counsel excepted and assign error.

Douglass & Douglass, for plaintiff in error.

Williams & Harper; and C. B. Wooten, for defendant in error.

By the Court.—Lumpkin J. delivering the opinion.

This was an action of trespass, and consequently, the bail taken in the case was not under the Judiciary Act of 1799, but at common law.

It was an aggravated case of assault and battery. Both bones of the left arm of the plaintiff are alleged to have been broken, besides other injuries being inflicted. The damages are laid at $2,000; and the plaintiff, in his affidavit, sets forth all the facts, and states that he claims or has sued for that amount. The Judge or Justice directed bail to be taken for $700 only.

A motion was made to dismiss the bail upon the grounds, 1st, that the sum sworn to was not endorsed upon the back of the writ; 2d. That no particular sum was sworn to; and 3d. Because the sum for which the Sheriff was directed to take bail, was different from that sworn to.

I would barely remark, that the second and third grounds are contradictory, namely: that no particular sum was sworn to, and the sum for which the Sheriff was directed to take bail, was different from that sworn to. But that is a small matter. The defendant in this case blends and confounds statutory and common law bail. By the Judiciary Act of 1799, the plaintiff swears to the amount which he claims; he files his affidavit in the Clerk's office, and bail process is annexed—the amount being endorsed upon the petition and process.

But at common law, before bail can be taken in cases of *tort*, the *fiat* of the Judge of the Superior or Justice of the Inferior Court must be had; and he prescribes the sum for which the bail is to be taken—forming his opinion from the facts sworn to by the applicant.

It will be seen, therefore, that the requisition that the *sum sworn to* shall be endorsed upon the writ, is inconsistent with the idea of bail at common law. And then, again, in statutory bail, the Sheriff or other arresting officer is commanded to take bond in double the sum sworn to; whereas, in bail at common law, he takes bond for the amount fixed by the Judge or Justice. The objection, then, that the sum sworn to was not endorsed upon the back of the writ, has no foundation.

Next, as to the oath of the plaintiff, not specifying any particular sum which he claims. He swears to the facts, and that he has laid his damages at $2,000. It is not necessary that he should do more. It is for the Court, and not for the party, to regulate the sum for which bail shall be taken.

As to the last objection, that the sum for which the Sheriff was required to take bail being different from that sued for. Here, again, is the same confusion to which we referred in the outset. At common law, we repeat, it is the Judge, and not the party, who is to decide for what amount bail is to be taken, and to issue his mandate accordingly.

We hold the Court was right in refusing to discharge the bail.

If there could be any doubt that the Act of 1799, authorizing bail in cases of contract, did not apply to cases in *tort*, the Act of the 6th of February, 1854, *(Pamphlet, p.* 40,*)* would settle the question. That Act authorizes a Justice of the Inferior Court to grant the order to hold to bail in all cases *ex delicto*, or sounding in damages, whether the case be returnable to the Superior or the Inferior Court.

Statutory bail exists as a matter of right; but bail for *torts* is allowed only on an order of the Judge. *Tidd's Practice,* 171, 173, *old edition.*

Judgment affirmed.

DANIEL GRIFFIN, plaintiff in error, vs. MONTGOMERY AND WEST POINT RAILROAD COMPANY, defendant in error.

The admissions of an agent, not made at the time when the fact transpires, upon which it it is sought to charge his principal, but subsequently, being no part of the *res gestæ*, should be excluded.

Trover, from Muscogee. Tried before Judge WORRILL, May Term, 1858.

The Montgomery and West Point Railroad Company conveyed a negro boy, Warren, from Columbus, belonging to Daniel Griffin, the plaintiff, away from his possession; whereupon he brought his action of trover.

On the trial of the case, plaintiff proposed to prove by the admission of David Cropp, conductor of one of the passenger trains of defendant, to the superintendent, Samuel G. Jones, that he carried plaintiff's boy, Warren, over the road, knowing him to be a negro, and that he belonged to plaintiff; the negro was passing for a white man, and he humored the joke, and charged him full fare. This admission was the last month of 1855, or the first of 1856, and Cropp was then a conductor on the passenger train of defendant.

Defendant's counsel objected to this testimony on the ground, that it was not a part of the *res gestæ*. The objection was sustained by the Court, and the plaintiff excepted.

Plaintiff then proposed to prove that Cropp made the same admission to Robert Simons, the night after he carried the negro boy Warren over the road. To which defendant's counsel objected. The Court sustained the objection, and plaintiff's counsel excepted.

Plaintiff then proved the value of the negro; a demand on defendant for the negro, and a refusal by the defendant to deliver him; and the ownership of the negro Warren. The right to possession being admitted to be in plaintiff.

Plaintiff closed his case; whereupon, defendant moved the Court for a nonsuit, which was granted by the Court, and and plaintiff excepted, and on these exceptions assigns error.

R. J. Moses, by Jno. A. Jones, for plaintiff in error.

Hines Holt, for defendant in error.

By the Court.—Lumpkin J. delivering the opinion.

To bind the principal by the admissions of his agent, they must be made at the time the thing occurs, or the business is transacted. 1 *Greenleaf, sec.* 713 *and note, and the authorities there cited.* The conductor is a competent witness in this case, and should have been examined. His sayings, made at a subsequent time, are no part of the *res gestæ,* and were properly excluded by the Court.

Judgment affirmed.

John A. Holt, plaintiff in error, vs. H. E. Experience, defendant in error.

The salaries of the officers of municipal corporations, under $500, are not subject to garnishment, by the laws of this State.

Certiorari, from Bibb. Decision by Judge Lamar, June Term, 1858.

Harriet E. Experience held a judgment against John A. Holt, and garnished the Mayor and Council of the City of Macon; and in answer to said garnishment, said Mayor and Council, by its proper officer, answered that they had funds in hands belonging to said defendant. Plaintiff proceeded to enter up judgment against said Mayor and Council.

Defendant objected upon the ground, that he was an officer of said corporation, and that the same could not be garnished for the salary of its officers—which was overruled. These proceedings were brought before the Superior Court from the Justices Court, and sustained; whereupon, the defendant by his counsel excepted and assigns error.

Lochrane & Lamar, for plaintiff in error.

Massey, for defendant in error.

By the Court.—**Lumpkin** J. delivering the opinion.

The only question in this case is, whether the salary, less than $500, of an officer of the municipal corporation of Macon, is subject to garnishment?

And to my mind, I must say, it is pretty plain. I am strongly inclined to think, that municipal corporations never were liable to garnishment, in this State, for the salaries of its officers. It is true, the Act of 1832 *(Prince*, 473,*)* is very broad. It declares, "that all banks, banking companies, and other corporations in this State, shall be liable to garnishment, both in cases of attachment and cases at common law." Why put banks and banking companies at the head of the list of corporations intended to be made subject to this process? Does it not indicate the legislative mind, that that Act was intended to embrace private and not public corporations? Naming, as it does, private and inferior corporations, can the Act, by the use of any general terms, be extended to public and superior corporations? We think not. There is the same reason for exempting the officers of municipal corporations from process of garnishment, that there is any other governmental agents. These local governments must be carried on; and its officers, like those of all other governments, are usually poor, and dependant upon their salaries for their support.

But were it otherwise, I should have no difficulty in this case. By the proviso to the Act of 1832, the corporations therein enumerated, are exempt from garnishment for the salaries of their officers. This section was repealed by the Act of 1834, *(Pamphlet, p.* 145,*)* re-enacted by the Act of 1835, *(Pamphlet, p.* 103.*)* It was repealed again by the 1st section of the Act of 1850, *(Cobb*, 88,*)* and the 2d second section of the Act of 1850, was substituted in lieu thereof, which is to this effect: "All banks, banking companies, and other corporations in this State, *except municipal corporations*, shall be liable to be garnisheed for the salaries of its officers, in all cases where such salary exceeds the sum of five hundred dollars."

A very obvious criticism is suggested by this Act, adverse to the view that municipal corporations never were liable to garnishment. Why exempt them?

I need not reply, that owing to the mode in which our legislation is conducted, it will not do to subject the language of statutes to too close a scrutiny. The further answer is this: that it had been held, that municipal corporations were subject to this process by some Courts, and therefore, out of abundant caution, and to secure to them entire immunity, the Act excepted them by name.

But to come back. What is the true exposition of the 2d section of the Act of 1850? The *proviso* of the Act of 1832, exempting salaries, is repealed. True; journeymen mechanics and day laborers were still protected by the Act of 1845, (*Cobb*, 88,) but the salaries of all other persons are made liable. The 2d section of the Act of 1850 must then be construed.

It either means to exempt the salaries of the officers of all corporations, under $500, or it means nothing at all. It clearly, by implication or negative pregnant, subjects these salaries where they exceed the sum of $500. Before this Act, we have seen that all salaries were subject, whatever their amount might be. The very object of the Act was to exempt salaries under $500; and it is upon this construction alone, that the decision made by this Court, during the present Term, in the case of *Arnold vs. Russell*, and in which I did not preside, can be sustained. The debtor there was neither a journeyman mechanic, nor day laborer; and consequently, did not come under the Act of 1845. This point I learn from my brethren, was not brought to the consideration of the Court; but it is clear, that the protection extended to the debtor in that case, who was the employee of a railroad, could not be justified under the interpretation now claimed for this Act. I believe, myself, the decision was right.

To recur then to the Act of 1850. By necessary implication, it exempts the salaries of all officers of all corporations whatever, from process of garnishment, where they are under $500. Where they exceed that sum, the salaries of officers of private companies are still subject. And the salaries of officers of municipal corporations are exempted, whatever the amount may be. Either this is so, or else they are liable, whatever the amount may be. For it is obvious, that the exception in the Act, either was intended to discriminate in favor of municipal corporations, and exempt them altogether, or to discriminate against them, and make the salaries of *their officers* liable, notwithstanding they might be less than $500. That is to say, the salaries of the city sexton, watch, police officers, &c., however scanty, should be wrested from the support of their wives and children, while the salaries of bank clerks, railroad agents, &c., should be exempt, provided they did not exceed $500, and then only for the excess! Such was not, and could not have been, the meaning of the Legislature. They designed to say, that the salaries of all banking and private corporation officers, over $500, should be liable to garnishment, at least for the excess; but that municipal officers were, and ever had been, free from this process.

The debtor, therefore, in this case, is doubly protected. His salary is less than $500, and hence he comes under the protection afforded to the small salaried officers of all corporations. And again, he is the officer of a public municipal corporation; and hence, if not upon general principles, he is certainly, under the Act of 1850, exempt from the operation of this process.

Now, if municipal corporations are not subject to garnishment, Judge CONE's Act does affect them, of course. If otherwise, this case is covered by the decision in *Arnold vs. Russell*, heretofore referred to, and which the Papers seem to think a very good judgment; but somewhat strained, perhaps. All I have to say is, that the Courts ought to strain hard to withdraw some of the most salutary statutes in the code—the result of the experience of the wisest men who have lived to adorn and bless our State, and to make it what it is—from the operation of the *novel* repealing clause annexed to the Attachment and Garnishment Act of 1856.

Judgment reversed.

SAMUEL SHEPPARD, plaintiff in error, vs. SIMEON BLUE, et al., defendants in error.

To entitle the heirs at law of an estate to the writ of *ne exeat* against the administrator, it is not necessary that the bill should charge that the securities upon the administration are insolvent, provided the other allegations are sufficient.

Equity, from Marion; motion to dismiss *ne exeat.* Decicided by Judge WORRILL, March Term, 1858.

Simeon Blue and others, complainants, filed this their supplemental bill against Samuel Sheppard, alleging that in January, 1854, they filed their bill against Samuel Stubb and the defendant, Sheppard, as the administrators of Benton W Dowd, deceased; and that by said bill they called upon the defendants, as the administrators of said Benton W. Dowd for an account and settlement with them, as the heirs at law and distributees of the said Benton; and by said bill they claimed a large sum of money, and called upon the defendant for a full discovery of his actings and doings, as such administrator, and for a full settlement, &c.; that said defendant filed his answer, and an order was taken, setting down said case for trial, which case is still pending and undetermined. That at the time of filing said bill, defendant was a citizen of this county, possessing real and personal estate in this county amply sufficient to respond to any decree that might be rendered against him in said case. That from the inventory of the estate of said Dowd, and from the sales of property of said estate, and from the returns of said defendant to the Ordinary, and from the best calculation complainants can make, &c., they are entitled to $3,000 from said defendant, and are entitled and expect to recover it. That since the filing of their said bill, defendant has sold out his real estate in the county, and is preparing to remove with all his property beyond the limits of the State, and jurisdiction of this Court; and that the defendant says he is going to remove beyond the jurisdiction of this Court; and that before they can get any decree in said case, he *will* remove with all his property beyond the jurisdiction of this Court; and that they will lose the whole amount of their claim unless he is restrained by the power of the Court; and without this, complainants are wholly remediless, and stand ready to comply with orders, &c., of the Court, touching the original as well as the supplemental bill. The prayer was for a writ of *ne exèat regno*, which was granted.

The defendant moved to discharge the writ of *ne exeat*, on the ground that it was improperly and improvidently granted; because, at the time the defendant removed from the State of Georgia, and at the time the same was granted, Solomon Wall, Richard Bosworth and Fielding Jackson were securities on his bond, as administrator, and that said bill contained no allegations of the solvency or insolvency of said securities.

The Court overruled said motion; whereupon, defendant's counsel excepted, and assign the same as error.

Blanford & Crawford, for defendant in error.

Elam & Oliver, for plaintiff in error.

By the Court.—**Lumpkin** J. delivering the opinion.

There was a bill filed for an account by the heirs of Benton W. Dowd, deceased, against Samuel Sheppard, the administrator upon the estate. After the answer came in, a supplemental bill was filed, praying for the writ of *ne exeat*. In this last bill the complainants allege, that there is $3,000 due them by the administrator; that he has disposed of his real estate in Georgia, and is about removing to the State of Alabama. They expressly allege, in the supplemental bill, that they will lose the whole amount of their claim, unless the defendant is restrained from leaving the State.

Judge **Worrill** sanctioned the bill, and a *ne exeat* issued and was executed. A motion was made to dismiss the *ne exeat*, upon the ground that there was no averment in the bill, that the securities upon Sheppard's administration bond were insolvent.

An allegation to this effect is not necessary. The complainants are entitled to all the security which the administration bond gave them; that of the principal as well as his bondsmen. It is explicitly charged, that if the principal be not restrained from going abroad, the claim will be lost. With the truth of this allegation we have nothing to do.

This is equitable bail. Suppose there be two parties severally bound as maker and surety upon a promissory note; an action is brought at law against the maker, and bail process is sued out—could the defendant dissolve the bail by alleging the solvency of the surety? We apprehend not.

Is it clear that a Court of Equity would not let the principal go free, and thereby impose the liability upon the securities who, under the Act of 1813, are entitled to this very remedy against this principal?

Judgment affirmed.

THE MUSCOGEE RAILROAD COMPANY, plaintiff in error, vs. WM. R. NEAL, defendant in error.

[1.] A plea to the jurisdiction comes too late, upon the appeal, there having been a trial at common law upon the merits.

[2] The Act of 1854, *Pamphlet p.* 92, is constitutional; and is not repealed by the Act of 1856. *Pamphlet p.* 155.

Notice for damages under the Act of 20th February, 1854, in Talbot Superior Court. Tried before Judge WORRILL, March Term, 1858.

This was a statutory proceeding by William R. Neal, against the Muscogee Railroad Company, for the recovery of damages for killing a negro belonging to plaintiff, upon their road, which negro was in the employ of the company. Defendant pleaded to the jurisdiction, and moved to dismiss the action, on the following grounds:

1st. That the Act of 20th February, 1854, is unconstitutional in this, that the body of the Act contains matter different from what is expressed in the title thereof.

2d. Because the Act of 20th February, 1854, no where confers on plaintiff the right to sue the defendant in the county of Talbot.

3d. Because at the time of bringing plaintiff's action, to-wit, on the 26th day of November, 1856, the Act of 20th February, 1854, had been repealed by the Act of March 5th, 1856, entitled an Act to define the liability of the several railroad companies of this State, for injury to persons or property, to prescribe in what counties they may be sued, and how served with process.

The Court overruled the motion to dismiss, as also the plea to the jurisdiction. Whereupon counsel for defendant excepted, and assign the same as error.

Plaintiff's attorney read an admission and waiver found upon the original notice which defendants attorney admitted was made.

SMITH & POU; and C. J. WILLIAMS, for plaintiff in error.

M. BETHUNE, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

I am inclined to think that every question made upon this record, is covered by the previous adjudications of this Court, in the case of *Jones against the Central Railroad*, 18 *Ga. Rep.* 247, and other cases in which these railroad corporations were parties, except the single question, as to whether or not the Act of 1854, is repealed by the Act of 1856? But were it otherwise, and this case stood upon its own merits, untrammeled by authority, the result would not be different.

[1.] As to the plea to the jurisdiction, it certainly comes too late upon the appeal; and that too after a trial upon the merits.

[2.] And as it respects the constitutionality of the Act of 1854, the title amongst other things, proposes to regulate the mode of proceeding in the cases embraced in it; *Pamphlet* *p.* 92; and of course covers the mode of proceeding in this case.

Is the Act of 1854, repealed by the Act of 1856? Or is the latter Act cumulative only. The latter Act only purports to repeal the former, so far as they are repugnant to each other. They are both affirmative statutes. The Act of 1856, *Pamphlet p.* 155, does not embrace all the objects provided for in the Act of 1854. It extends only to injuries done by the running of the engines and cars of the company. The Act of 1854, is broader, and not only includes injuries done by the engines and cars, but by the operation and use of any other machinery; and indeed for every other injury whatsoever.

Now, the notice in this case is not only very full, but in one count charges, that the injury was done by the running of the engines and cars, "and other machinery;" and for anything that appears to the contrary, the killing of the plaintiff's negro may have been caused in a way not provided for in the Act of 1856.

We see nothing in this case to justify a judgment of reversal.

Judgment affirmed.

Edward T. Taylor & Co., plaintiffs in error, vs. William E. Collier, defendant in error.

If a common carrier fail to deliver goods according to contract, and they are lost, he is liable for the value of the goods, at the place of destination at which he engaged to deliver them, deducting the freight.

Action on the case, in Dougherty Superior Court. Tried before Judge Allen, June Term, 1858.

This was an action brought by Edward T. Taylor & Co., against William E. Collier, to recover damages for failure to deliver four cotton gins.

James Hill, swore on the part of the plaintiffs, that in 1848, the defendant hired him to drive his wagon, and haul gins for the plaintiffs from the Chattahoochee; took four gins to be delivered in Lowndes county; the team gave out and he put said gins in an old house, and they have never been delivered.

Slaton said: He knows plaintiffs delivered defendant five gins, one was to satisfy him for the delivery of the other four to persons to whom they had sold them.

Defendant agreed to deliver them in time to gin the growing crop, and keep the one for his trouble; witness as agent, made with defendant this contract for the plaintiffs, and thinks if the gins had been delivered, plaintiffs could have sold a good many more in Lowndes county. The four gins were worth $400. The contract really was, that the defendant was to pay $100 for the gin he kept, in hauling at the rate of $4 per day.

Huff, overseer of defendant: Was overseer at the time the gins came to defendant. Defendant was absent, and witness had no instructions to receive them. Defendant's wagon and team carried the gins away.

Defendant introduced an exemplification of an action on the case for the failure to deliver these same four gins, in the county of Lee, which was nonsuited.

Also, introduced an exemplification of a suit in Lee against defendant by plaintiffs, to recover the gin the defendant kept, which last suit had been settled by defendant paying the money.

The evidence being closed, the jury found a verdict for defendant, and plaintiffs moved the Court for a new trial on the following grounds:

1st. Because the Court erred in striking out that part of the declaration claiming damages over and above the price of the four gins which defendant failed to deliver, because plaintiffs did not set forth the names of the parties to whom they could have sold other gins if the defendant had delivered them in terms of the contract.

2d. Because the Court erred in charging the jury that if the plaintiffs had recovered the price of one gin, it being to compensate the defendant for delivering the others, that it was a recision of the contract, and the defendant was not liable.

3d. Because the Court erred in charging the jury that if the defendant had agreed to haul gins for the plaintiffs from Chattahoochee, and defendant's driver had taken the gins upon the wagon at defendant's plantation, that they ought to find for defendant.

4th. Because the Court erred in refusing to charge the jury, that if they believed James Hill was employed by defendant, and had control of defendant's wagon and team, and driving the same for defendant, and taking the gins upon the wagon at defendant's plantation, and failed to deliver them, whereby plaintiffs lost said gins, hat the defendant was bound for the acts of his driver as a common carrier, and liable for the same.

5th. Because the verdict of the jury was contrary to law and the evidence.

The Court overruled the motion for a new trial, and plaintiff's counsel excepted.

Spicer, for plaintiffs in error.

Strozier & Slaughter, for defendant in error.

By the Court.—Lumpkin, J. delivering the opinion.

This action was brought by the plaintiffs, to recover of the defendant damages for failing to deliver four cotton gins in Lowndes county, to certain persons named in the declaration; and also for losing the opportunity of selling twenty-six others, by reason of the failure of the defendant to deliver the four in time, to gin the cotton crop of 1848.

On the trial, the defendant moved to strike out so much of the declaration as sought to recover anything on account of the twenty-six gins, as mere speculative damages. The Court sustained the motion, and we think, properly. A plainer case of contingent or speculative damages, has not perhaps been brought before this Court.

The testimony having closed, counsel for the plaintiffs requested the Court to charge the jury, that if they believed James Hill was employed by defendant, and had control of defendant's wagon and team, and was driving the same for defendant, and took the gins upon the wagon at defendant's plantation, and failed to deliver them at the place of destination, and they were thereby lost to the plaintiffs, the defendant was bound by the acts of his driver, as a common carrier, and liable to the plaintiffs for the gins.

This request, the Court refused, and on the contrary charged the jury, that if they believed that defendant had agreed to haul the gins for plaintiffs, from Chattahoochee, and defendant's driver had taken the gins upon his wagon at defendant's plantation, they ought to find for the defendant.

The objection both to the request to charge, and the charge as given, is for want of accuracy and fulness.

There was some proof, that the gins were to be hauled from Chattahoochee. Hill swore without objection, that the defendant so stated to him. Still he took the gins at Collier's plantation. Huff the overseer of Collier, swears, that he had an impression, that the gins were to be hauled from Chattahoochee. Slaton, however, the agent of the plaintiffs, delivered the gins at defendant's plantation. And notwithstanding Mr. Huff's testimony, that he refused to receive them, they were left there; and from that place, they were taken by Hill, the wagoner of Collier, who started with them to Lowndes county; and the horses giving out by the way, the gins were deposited in an old house; and that is the last we hear of them. No complaint is heard from Mr. Collier, that his wagoner exceeded his authority. No notice is given to the plaintiffs, that their property, has been put out by the wayside. They are not brought back to Collier's plantation.

Independent of the general authority of the wagoner to haul for plaintiffs, the jury might well infer from all the facts and circumstances of the case, the subsequent assent of Collier to this act of Hill, his driver. One thing is certain, the gins were taken by Collier's driver, from Collier's plantation, and left at an unauthorized place, and thereby the plaintiffs have lost their property.

The Court further charged the jury, that if they believed, that plaintiffs had received the price of one gin, it being to compensate the defendant for his services, in delivering the others, it was a rescission of the contract, and the defendant was not liable.

Here we think, was a clear misconception of the law of the case. Had the plaintiffs sued to recover the fifth gin, it would show an abandonment perhaps of the contract. This he did not do. They brought an action to recover *the price* of one gin, which they did: That is, they get back the price of the hauling which they had paid in advance. Well, what then? It left the parties just where they stood under the contract alleged to have been broken by the defendant. It is no rescission of the contract.

What then is the law of the case, provided, it should turn out that the contract has been violated? This Court laid pown the rule in *Cooper vs. Young*, 22 *Ga. Rep.* 271, to be this: That if a common carrier fails to deliver goods according to contract, and they *are lost*, he is liable for the value of the goods, at the place of destination, at which he engaged to deliver them, deducting the freight.

The price of the four gins in Lowndes county was $400, the freight $100 leaving $300, as the measure of the plaintiffs' recovery. There may be some conflicting authority upon this point. But the rule is pretty well sustained. And having been adopted by this Court, we see no reason for not adhering to it.

Upon the whole, we think the case had best be remanded for a new trial.

Judgment reversed.

WILLIAM T. MASSEY, plaintiff in error, vs. AQUILLA CALHOUN, defendant in error.

The 20th section of the Act of 1851—2 (*Pamphlet pp.* 97, 98) prohibiting Ordinaries and their legal partners from practising or giving counsel in cases originating in their Courts or connected therewith, expounded.

Assumpsit, from Bibb. Tried before Judge LAMAR, June Term, 1858.

This was action of assumpsit by William Massey against Aquilla Calhoun for the recovery of one hundred dollars, for professional services rendered as an attorney at law.

The defendant came to E. A. Nisbet and stated that the parties had agreed to leave the construction of the will of his father to Nisbet, Poe, and the Ordinary. Plaintiff was the

Ordinary, and was present and took part in the consultation at the office of Poe & Grier, and not on a day of the Court of Ordinary.

The only question submitted for their legal opinion was, "whether Mrs. Cason, formerly widow of the testator, Elbert Calhoun, was entitled to any share of the property willed to young Elbert Calhoun, who had died without issue and before reaching twenty-one years of age." The legal opinion was in writing, and admitted in evidence, to the admission of which plaintiff excepted.

The question of the necessity of any administration on young Calhoun's estate was not before them in consultation, and was introduced into the opinion by Judge Nisbet merely for illustration and advice, after the consultation was ended and the attornies dispersed.

The following are all the provisions of Mr. Calhoun's will which are material to the understanding of the case, and question submitted.

E. Calhoun bequeathed to his son Elbert, negroes and land—to his wife several negroes for life, and all the lands and plantations he might die possessed of during her life; also all his stock and all other property which he might die possessed of, not given away in his will; and further says, "she is to have them for her use, and all the negroes I have given away, until each heir becomes of age, for the purpose of raising, maintaining and schooling them." He further wills that at the death of his wife, his son Elbert shall have all the personal property, and that the negroes left to her shall be divided among his heirs; and proceeds to divide them specifically, giving two of them which he names to Elbert. Also, "that if my son Elbert Calhoun should become of age during his mother's life, that he have possession of half the land I have given her in this my will, reserving the house for his mother during her life;" and that "if either of my children should die without issue, then and in that event the property I have given to them be returned, and become part of my estate, and be equally divided among the surviving heirs." He, in addition, provides that if his wife should die before the children become of age, his executors shall keep all his property together, and keep up his plantation for the use and benefit of the child or children that may not be of age, and whatever shall be made, it shall be for the use and benefit of those that are not of age.

The legal opinion of those employed in the consultation was, that Mrs. Cason was entitled to share in the property of young Calhoun.

Defendant's counsel moved a non-suit, insisting that the account of one hundred dollars, which Massey, the Ordinary, had charged defendant for professional services in the consultation, and which he had sued on, was for services rendered in opposition to the laws of this State, which prohibit Ordinaries from practising in their own Court, or acting as attornies in matters therewith connected; which motion was sustained, and a non-suit awarded; whereupon plaintiff excepted to said decision, and assigns the same as error.

JOHN RUTHERFORD, for plaintiff in error.

L. N. WHITTLE, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

The 20th section of the Act of 1851-2 (*Pamphlets pp.* 97 98) provides "That it shall not be lawful for the Ordinary, nor any legal partner of said Ordinary, to practice in said Court of Ordinary, or be retained as counsel in any cause originating in said Court and carried by appeal or writ of error to any higher Court; nor shall said Ordinary or his legal partner receive any fee or reward for any service rendered or counsel given in any matter connected with said Court, other than the fees authorized by law to said Ordinary; and any Ordinary violating the provisions of this section or permitting its violation by any legal partner practising in said Court before him, shall be guilty of a misdemeanor, and on conviction shall be fined and imprisoned at the discretion of the Court, and shall forfeit his commission, and shall be ineligible to re-election: *Provided* nothing in this section shall prevent said Ordinary from practising in any other cause in any other Court."

Does the case made by the record come within the prohibition of this Act?

We propose to examine this question in two aspects—the one as presented by the written opinion itself; and the other as it appears from the testimony of Judge Nisbet. Taking the written opinion alone, and the case is free from doubt or difficulty. The advice given as to the propriety of dispensing with any administration upon the estate of young Elbert Calhoun, who resided in Bibb county at the time of his death, is touching a matter directly connected with the Ordinary's office and Court.

But take the case as presented by the evidence of Judge Nisbet. He testifies that the only thing submitted to counsel was, whether Mrs. Cason, formerly the wife of old Elbert Calhoun, took any portion of the property left to her son Elbert, who died a minor, and without issue.

It is argued that this involves a question of the construction of a will; and that this Court held in *21st Georgia Reports*, in the case of *Beall against Drane*, that the office of construing wills belonged to the Courts of Chancery, and not to the Courts of Ordinary. In the case cited, it was insisted that certain clauses in the will of Beall were void on account of their uncertainty. And this Court decided that it was not competent for the Ordinary to pass upon that point. There are cases, however, where it may become absolutely necessary for the Ordinary to construe a will. And is not this case one of them?

Counsel in this case advised that the property bequeathed to young Elbert Calhoun by his father, reverted to the estate;

and was subject to distribution amongst all of the testator's heirs at law. And that Mrs. Cason, the widow, shared in the distribution with her children. Suppose the executor of old man Calhoun's will had distributed the whole of the property to the brothers and sisters of young Elbert Calhoun, and Mrs. Cason had appeared before the Ordinary and contested his return, as it was her privilege to do; or assume that no opposition had been made at the time, yet when the executor sought, upon citation, to be dismissed, Mrs. Cason had appeared and resisted his discharge upon the ground that this property had not been legally divided, she being excluded, would not the Ordinary have been compelled to decide the question?

The very question, then, which upon consultation with the other counsel, William Massey gave his professional opinion, might and likely would have been presented for his judicial determination. It was a matter, then, in the language of the statute, "connected with his Court."

Ordinaries should forbear to be mixed up, as lawyers, with anything appertaining to testate's or intestate's estates which belong to their office. In the present case, it is needless to remark that the character of the incumbent forbids the idea that he intended to violate or disregard the law. The character of the gentlemen associated with him equally precludes any such belief. It was an error of judgment which all men are liable to commit. It was designed that Ordinaries should be the gratuitous counsellors of all trustees having business connected with their Courts. It is an office of transcendent importance. All estates are constantly passing through it. For it is not more sure that we shall all die, than it is that every estate has to pass under the review of the Ordinary. To give full force and effect to the law, we are constrained, however reluctantly, in this instance, to affirm the judgment of the Court below. We are fully persuaded that it was right.

Judgment affirmed.

ROBERT B. HELMS, plaintiff in error, vs. GREEN H. O'BANNON, defendant in error.

[1.] A power of attorney proven before a Justice of the Peace in Texas is sufficient to authorize the conveyance of land under it in this State, under the Act of 1785. *Cobb*, 165.

[2.] No other addition to the name of the witness proving the power, other than that of "citizen" of a certain county, is necessary.

[3.] Possession may be looked to certainly by the jury, as evidence of notice, by a subsequent purchaser.

Is not possession itself notice, so far as to charge the purchaser with a knowledge of defendant's title; to put him upon inquiry, so as to ascertain the truth?

Ejectment, from Stewart county. Tried before Judge KIDDOO, April Term, 1858.

John Doe, on the several demises of Green H. O'Bannon and Benjamin May, brought suit against Richard Roe, casual ejector, and Robert B. Helms, tenant in possession, for lot of land 239, in the 22d district. Plaintiff, on the trial, gave in evidence copy plat and grant of said land to said O'Bannon, and offered in evidence a power of attorney from O'Bannon of Texas to James R. Butts, of Georgia, to sell and make titles to the same—said power of attorney purporting to have been made in Texas.

The subscribing witnesses to said power of attorney made affidavit before a Justice of the Peace that they saw O'Bannon sign and deliver the same, and they attested it; and the Justice of the Peace states they were known to him personally.

The Governor of the State of Texas certifies that said Justice was at the time in commission as such.

Defendant objected to the admission of the said power of attorney in evidence, on the ground that it had not been proven in accordance with the Act of 1785, "to render easy the mode of conveying land, &c."

The Court overruled the objection, and defendant's counsel excepted.

Plaintiff then introduced a deed from Butts, as attorney for O'Bannon, to Benjamin May; and also William R. Hart, as witness, who testified that Helms, in the fall of 1854, went into the possession of the land and had lived there ever since, and was in possession of the same at the time the deed to May was executed, as of his right and property, and closed his case.

The defendant read in evidence the original plat and grant to O'Bannon, and a deed from O'Bannon to D. Jarratt, and a deed from the executors and distributees of the estate of said D. Jarratt to said Helms for said land, for the purpose of showing that at the time the deed to May was executed, Helms was in the adverse possession of said land under color and claim of title, together with other evidence. Defendant also read in evidence a deed from himself to Paramour to 100 acres of the west side of said lot, to show that at the time May got his deed and commenced his action, he was only in possession of one-half of it. Defendant introduced testimony to show the value of clearing and improving, and of the rents, and to substantiate the facts set forth by the deeds, and that defendant was in possession of only one-half the land when plaintiff commenced his action.

The Court charged the jury that if the plaintiff recovered at all, he must recover on the demise in the name of O'Bannon or of May.

And that if they should believe from the evidence that the defendant, Helms, at the time O'Bannon executed the deed to May was in adverse possession, and holding the east half of the lot under color of title and claim of title, and that the deed from the executors of Jarratt was the evidence of color of title, or was color of title, then the plaintiff could not recover on the demise in the name of May, for the deed from

O'Bannon was void under the statute of 32 Henry the 8th against bracey, and buying of titles.

To which charge defendant excepted, and requested the Court to charge the jury:

That if they should, under the law and evidence, find the deed from said O'Bannon to May to be void in consequence of said Helms having been in the adverse holding and possession of said lot of land under color and claim of title, at the time of the execution of said deed, in that case the plaintiff could not recover on the demise in the name of O'Bannon, because the said O'Bannon, on the 5th November, 1833, had conveyed said land by deed and with warranty of title to said Jarratt, although previous to the issue of the grant, and under that view of the case, the jury should find for the defendant the premises in dispute.

Which the Court did then and there refuse to charge, but charged the jury:

That if they should, from the evidence, believe and find that Helms, the defendant, at the time O'Bannon executed the deed to May, was in the adverse holding and possession of said lot of land, or the east half of it, and that under color and claim of title, and that the deed from said O'Bannon was void, still the plaintiff could fall back upon the demise in the name of O'Bannon and recover the premises in dispute on that demise. Although O'Bannon did, on the 5th November, 1833, sell and convey said lot to Jarratt by deed and with warranty of title, previous to the issue of the grant to said lot of land.

To which charge and refusal to charge, counsel excepted.

The jury found for the plaintiff on the demise in the name of O'Bannon. And on these several exceptions defendant's counsel assigns error.

WORRILL, for plaintiff in error.

TUCKER & BEALL, for defendant in error.

By the Court.—Lumpkin J. delivering the opinion.

The facts in this case are briefly these. Green H. O'Bannon was the drawer of the lot of land in dispute, which was granted in 1837. In 1833 O'Bannon sold and conveyed the land to one D. Jarratt. In 1854 the Jarratts sold to Helms, the defendant, who commenced building thereon toward the close of that year, and went into possession with his family in the beginning of 1855. In November, 1855, O'Bannon, through James R. Butts, his attorney in fact, conveyed the land to Benjamin May. The deed from O'Bannon to Jarratt is recorded December, 1855; and the deed from O'Bannon to May is recorded in November, 1855. This is an action of ejectment, brought to recover the land from Helms. There are two demises in the declaration—one from O'Bannon, the grantee, the other from May, the vendee of O'Bannon.

The deed from O'Bannon to May is made under a power of attorney executed in Texas. Two objections were made and overruled by the Court as to the power of attorney. One that it is proven before a Justice of the Peace; the other that the certificate of the Justice does not state the addition to the name of the party proving the power. The words of the Act are:

"All bonds, specialties, *letters of attorney*, and other powers in writing, which shall be produced in any Court or before any Justices in this State, the execution whereof being proved by one or more of the witnesses thereunto by affidavit or solemn affirmation in writing before any Governor, Chief Justice, Mayor, or other Justice of either of the United States where such bonds, letters of attorney, or other writings are or shall be made or executed, and accordingly certified and transmitted under the common or public seal of such State, Court, city or place where the said bonds, letters of attorney, or writings are proved, shall be taken and adjudged as sufficient in law as if the witnesses therein named had been present; and such certification shall be sufficient evidence to the Court and jury for the proof thereof: *Provided* that in every such affidavit or affirmation there shall be expressed the addition of the party making such affidavit or affirmation, and the particular place of their abode." *Cobb*, 165.

To our mind it is clear, that if the deed is proven before a Justice of the Peace of Texas, it is a sufficient compliance with the statute. Had the Act read, before the "Chief Justice" or other Justice, without any intermediate officer being named, the objection would have had much more plausibility. But it is, before the "Chief Justice, *Mayor* or other Justice of either of the United States." The Mayor of a corporate town or city is, in some of the States, a Justice of the Peace *ex officio*. It can hardly be supposed that the Act intended, by naming him first, to elevate him above the Justices of the Supreme Court. For the Act, it will be seen, begins at the highest officer and descends.

The words "*other Justice* of either of the United States" are very broad. They include all others than the Chief Justice in either of the States; and consequently, a Justice of the Peace.

[2.] As to the addition to the name of the witness, that idea might do in 1785, the date of the Act; but all distinctions have long since become obsolete. And "*citizen* resident in Montgomery county" is as full and descriptive as any other language could have been. Surely the addition of Colonel or 'Squire would constitute no addition at this day. We agree with the Court, therefore, that the power to Butts was properly proven.

The Court, amongst other things, charged the jury, at the request of defendant's counsel, that if they believed that Helms was in the adverse possession of the land in controversy, under color of title and claim of right at the date of the deed from O'Bannon to May, that May's deed was void under the statute of 32 Henry 8th; and for giving this charge the Court will be compelled to reverse the judgment and send the case back, according to its opinion in *Cain & Morris against Monroe*, 23 *Ga. Rep.* 82.

It is needless to consider the third request made by defendant's counsel, and which the Court rightfully refused to give. But we will examine the charge made in lieu thereof, namely, that notwithstanding the deed from O'Bannon to May might be void, still the plaintiff could fall back upon the demise in the name of said O'Bannon, and recover the premises, although he sold the land in 1833 to Jarratt by deed of warranty.

The Court was looking at this case alone in the light of 8th Henry. Hence the jury was instructed that the deed from O'Bannon to May was void, provided there was adverse possession in Helms at the time. But that, nevertheless, the plaintiff might fall back and recover the premises, notwithstanding the conveyance to Jarratt in 1833.

Having held that the statute of Henry 8th was not of force in this State, of course all this view of the case was wrong. What is the law which should regulate it according to the facts as proven? It is not true that a recovery could be had in this case upon the demise of O'Bannon. He sold to Jarratt in 1833. True, the grant was not taken out till four years afterwards; but this Court has held, and such, no doubt, is the law, that as between O'Bannon and Jarratt, or Helms claiming under Jarratt, there could be no recovery in favor of O'Bannon. The land was bought by Jarratt twenty-five years ago. The deed acknowledges, upon its face, the payment of the purchase money. We must presume it paid after such a lapse of time. If so, the equity of Helms was complete. He not only had a title under which he could defend himself according to *Pitts and Bullard;* but one upon which he could maintain ejectment according to the decision of this Court in the case of *Beacham vs. Goodson,* not yet reported.

Well, what is the condition of May, the statute of Henry

8th being out of the way? His deed being recorded first, he could hold against the elder title to Jarrett under the Act of 1837, (*Cobb*, 175) unless he had notice of the prior conveyance. And the same doctrine we apprehend to be true, even if the Act of 1837 had not been passed. For the grant not having issued till four years after the deed to Jarratt, if O'Bannon sold subsequently to May, without knowledge of the previous conveyance to Jarrett, he would hold against Jarratt.

In *Wyatt and others vs. Elam and others*, (23 *Ga. Rep.* 201) this Court held that possession is a fact admissible in evidence, against the person claiming under the younger recorded deed, that the latter purchaser had notice of the older deed at the time when he took the younger; and this under the Act of 1837. Well then, apart from the statute, which does not, perhaps, apply in this case, as one of the deeds was executed since its passage, we have already held, that O'Bannon could not recover of Jarratt, notwithstanding the land was not granted at the time he sold to him. Of course, no one buying of O'Bannon, with knowledge of the previous conveyance, is in any better condition than O'Bannon himself.

[3.] Now we are all clear and unanimous in holding that if May, at the time he purchased of O'Bannon, had knowledge of the previous sale to Jarratt, he is concluded by such notice; and that the possession of Helms claiming under Jarratt may be looked to by the jury as evidence of notice. My brother McDonald thinks there must be actual notice on the part of May of Helms' possession; which actual notice may be inferred by the jury from the fact that May lived in the immediate vicinity of the land, or in any other satisfactory way; while the other members of the Court concur fully in this, they are inclined to think that the doctrine goes further, and to hold that possession itself is notice; so much so, as to charge the purchaser with the knowledge of defendant's title. (2 *Spence's Eq. Jur.* 759 *Note K.*) At any rate, the purchaser is put on inquiry and bound to ascertain the truth. (*1st Story, Eq. Jur. Section* 400; 4 *New Hampshire*, 397, 404, 405; *Sugden on Vendors*, 1052, *7th A. E.*, to the same effect. 22 *Maine*, 312, 313. These cases from N. H. and Maine are very strong. In either view of the case, it must be sent back.

Judgment reversed.

CHARLES STANDLEY, plaintiff in error, vs. WILLIAM HARRISON, late Sheriff, defendant in error.

A Sheriff who is in custody, under an order of Court, for failing to pay over money collected by him, may avail himself of the benefit of the insolvent debtors' Act.

Application to take benefit of Honest Debtors' Act; from Randolph county. Tried before Judge KIDDOO.

William Harrison was attached for failing to pay over money which had been collected by him as Sheriff. He filed his schedule, and made application to the Court to take the benefit of the honest debtors' Act, and the Court permitted him to take the benefit of the Act. Whereupon, the counsel for Standley excepted, and assigns error.

W. C. PERKINS, for plaintiff in error.

G. L. BARRY, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

The only point in this case is, whether a Sheriff who is in custody, under an order of Court, for failing to pay over money in his hands, can avail himself of the benefit of the insolvent debtors' Act.

In the case of *Chipman vs. Barron*, 2 *Ga. Rep.* 220, this Court was inclined to the opinion that he could. The same view was incidentally expressed in the case of the *Sheriff Stephens.* 1 *Kelly*, 590.

The imprisonment is for a two-fold purpose; by way of punishment for the contempt of the officer, in failing to discharge his official duty; and a remedy to the party, to coerce the payment of the money. It is competent for the Court to remit the punishment, by ordering the imprisonment to be discontinued, whenever the Sheriff purges himself of the contempt; and then becoming, as it does, a mere private remedy for the benefit of the creditor, the debtor is entitled to be relieved, as well against this debt as any other; otherwise, his imprisonment would be perpetual. 1 *Bailey's S. C. Reports*, 605.

Judgment affirmed.

ROBERT PARKER, plaintiff in error, vs. THOMAS B. JENNINGS, defendant in error.

When there has been no service, the judgment is a nullity, and the defendant can take advantage of it by affidavit of illegality.

Illegality, from Webster county. Decision by Judge KIDDOO, March Term, 1858.

Defendant Parker made an affidavit of illegality to the execution in favor of Jennings against him, that it was proceeding illegally, because he had no notice of the pendency of the suit upon which the judgment was founded, until execution issued against him; that he resided, at the time the suit was commenced, in Monroe county, and was never legally served.

There was an entry of service on the writ, by the Sheriff, who stated that he left a copy of it at defendant's most notorious place of abode.

Upon motion, the Court dismissed the affidavit of illegality; whereupon, counsel for Parker excepted, and assign error.

TUCKER & BEALL, for plaintiff in error.

B. S. WORRILL, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

The single question in this case is, whether, when the defendant has not been served in a case, he can get rid of the judgment by affidavit of illegality.

This Court has repeatedly held, that upon an affidavit of illegality, you cannot go behind the judgment; and moreover, that the validity of the judgment itself cannot be attacked by such a proceeding. But it will be found, upon examination of the cases, it was where the judgment was voidable only, and not absolutely void. Of course, the judgment being good, until set aside, where it is erroneous only, it supported the execution issued on it.

To what issue do the pleadings conduct us in this case? The defendant alleges, that the execution is illegal. The plaintiff replies, that it is founded upon a judgment, and conforms to it. The rejoinder is, that the judgment itself is a nullity—the defendant never having been served with process in the case. If this be so, is not the *fi. fa.* illegal? We think so, most clearly. For it is a well settled doctrine, that a judgment without any service is utterly nugatory; and may be attacked directly or collaterally, and set aside in any Court where it is brought in question; and this Court has never ruled to the contrary.

Judgment reversed

ROBERT BOWMAN, executor and trustee, plaintiff in error, vs. JESSE L. LONG, defendant in error.

[1.] The tenant for life in property is entitled to the possession of the "corpus" of the property for his own use, subject to a right in the remaindermen to have the property in a state of security, to be forthcoming to them, on the termination of the life estate.

[2.] A trust in which the trustee has nothing to do, is an executed, and not an executory, trust.

In Equity, from Bibb county, between Long, complainant, and Brown, defendant. Tried before Judge LAMAR, May Term, 1858.

The allegations of this bill are set forth in the report of the same case when it was before this Court on demurrer, at Macon, June Term, 1857, except the following amendment, filed by complainant to the bill, and served on defendant the 21st May, 1858, and which comes in at the place where complainant alleges "that by virtue of the will and codicil, &c.," "that in the event that said legacy so left as aforesaid to his child and ward, should be held to vest in said child, and yet that the trustee for his said child should be entitled to retain the possession of the same, then he, in his capacity of guardian of his child, is entitled to demand and receive of and from the said trustee, the annual rents, issues and profits thereof, and such profits, rents and issues as may have heretofore accrued thereon; and he prays that defendant may be decreed to account to your orator for all and singular the rents, issues and profits of the property which has come to his hands as trustee aforesaid, or in his character of executor aforesaid, belonging to said ward, up to the time of the hearing on this bill; and that he be decreed to pay over to complainant annually, all and singular the income, rents, issues and profits of the said property, from and after the final hearing on this bill."

The bill prays also, besides what is reported in the case referred to, that the real estate left to said ward be sold, and the one-half of the proceeds thereof be paid to your orator, that the expense of this suit be paid out of the said estate, and that defendant answer the allegations in the bil—lwhat is the value, condition and income of the estate left to said ward, &c.

On the trial, after the pleadings were read to the jury, complainant's counsel asked the Court to charge: "That the rents, issues and profits of the estate left to W. H. Long, in the will of John Bowman, deceased, belong to him, the said W. H. Long, unconditionally, and that upon his death they descend to his legal representatives;" which the Court gave as requested, and defendant excepted.

Defendant then asked the Court to charge the jury, that in the event of the death of said W. H. Long before arriving at the age of 21 years, then the annual rents, issues and profits of the estate willed to him by John Bowman, deceased, which had accumulated since the death of said John Bowman, should, with the *corpus* of the property, go to the heirs of said John Bowman, other than the wife of said John Bowman; which said request the Court refused to give in charge; but on the contrary charged the jury, that in the event of the death of W. H. Long before arriving at the age of 21 years, then the accumulated rents, issues and profits of said estate, should go to the legal representatives of said W. H. Long. To which refusal to charge as requested, and to which charge as given, defendant by his counsel excepted and assigns the same as error.

Poe & Grier, for plaintiff in error.

E. A. & J. A. Nisbet, for defendant in error.

The complainant also brought this case up and assigned errors:

Because he, by counsel, moved to prove the quantity and kind of property left by John Bowman to the ward of the complainant, William H. Long, in his last will and testament, and was refused the motion on the objection of defendant's counsel, that complainant was not, according to the law and equity of the case, entitled to a decree for the recovery and control of the *corpus* of the property so left as aforesaid.

Because the complainant's counsel moved to be permitted to introduce evidence of the annual amount of the rents, issues and profits of the property left by John Bowman in his last will and testament to W. H. Long, the ward of complainant, now in the hands of the defendant, and the probable future annual amount of the same; which the Court refused, upon the objection of defendant's counsel, on the ground that the complainant was not in law and equity entitled to a decree for the rents, issues and profits of the said property, and on the ground as stated by the Court, that whilst the rents, issues and profits of the estate left by John Bowman to W. H. Long belonged to him, the said W. H. Long, and at his death intestate, to his heirs, yet, that the complainant was not entitled to the possession and control of the same, but that said rents, issues and profits remain in the possession and control of Robert Bowman, trustee for the said W. H. Long, until his death or arrival at the age of 21 years.

Because the complainant moved to be permitted to prove the annual value of the aforesaid rents, issues and profits, the age, condition and social *status* of the said W. H. Long, in order to a decree for an annual allowance out of the said rents, issues and profits, for the support, education and maintenance of him, the said W. H. Long; and counsel for defendant objected thereto, upon the ground, that according to the law and equity of the case, the complainant was not entitled to such decree; and the Court sustained the objection, deciding that the income of the separate estate of the child, the father being in life, cannot be applied to the support, education and maintenance of the child, but upon averment and proof by the complainant, of his inability to educate, support and maintain him.

Because counsel for complainant moved the Court to be permitted to prove the value of the services of counsel for the complainant, in conducting the litigation between the parties to this cause; and defendant's counsel objected, upon the ground that complainant was not entitled to a decree for compensation to his counsel out of the estate belonging to his ward, in the hands of defendant; which objection the Court sustained.

The verdict was in pursuance of the ruling and decisions of the Court.

E. A. & J. A. Nisbet, for plaintiff in error.

Poe & Grier, for defendant in error.

By the Court.—Benning J. delivering the opinion.

These two cases grow out of a bill filed by Jesse L. Long, as the guardian of his minor son, Wm. H. Long, against Robert Bowman, as executor of John Bowman, deceased, to obtain possession of the legacy left to the minor son, in the will of John Bowman.

One of the questions in the cases, is, was the guardian entitled to have possession of the "corpus" of the legacy, for the use of the ward?

The estate which the ward took, was the fee, or absolute interest, subject to be divested on his dying under the age of twenty-one years. *Long vs. Bowman*, 23 *Ga. R.*

Such an estate as that, was in certainty as much as an estate for life; in possibility as much as an estate in fee simple. It is safe, therefore, to rank it as high as a life estate.

[1.] In a life estate, the tenant is entitled to have the possession of the property for his own enjoyment; and all that the remainder-man can require, is, that the "corpus" of the property shall be kept in preservation, to be delivered to him on the termination of the life estate.

This is the general rule. And this, if it applies in these cases, gives this guardian the right to the possession of the "corpus" of the property bequeathed to his ward. The guardian is the person entitled to the possession of the ward's property.

Is there anything to take the case out of the general rule? It is said that there is something; namely, the testator's appointment of a trustee for the ward.

It is true, that the last item of the codicil is in the following words: "I appoint my son Robert Bowman, trustee for my said grand-son, William Henry Long." And it is, probably, true, that the testator's intention in this item was, that his son Robert should hold the property bequeathed to the grand-son, in trust for that grand-son.

But are the words creating the trust, sufficient to effectuate such an intention? That depends, doubtless, on whether the trust they create, is an executed or an executory, trust. If it is an executed trust, that is, a trust in which, the law "conveys the possession to the use, and transfers the use into possession, thereby making *cestui que use* complete owner of the" property "as well at law as in equity," (2 *Black.* 333,) then it is clear, that the words are not sufficient to effectuate the intention; for no words can be sufficient to effectuate an intention which is contrary to law. If the trust is executory, the case may be different. In such a trust, the legal title remains in the trustee.

Is this, then, an executed, or an executory, trust?

[2.] It is not an executory trust, for the trustee has nothing to do. "There is a settled distinction between trusts, *executed* and *executory.* In the latter, *something is left to be done; some conveyance thereafter to be made.*" 2 *Kelly,* 320, *quoting Kent.*

It is an executed trust. The statute of uses declares, that "when any person shall be seized of lands, &c., to the use, confidence, or trust, of any other person;" that person shall "stand and be seized or possessed of the land, &c., of and in the like estates as they have in the use, trust or confidence; and that the estate of the person so seized to uses shall be deemed to be in him or them that have the use, in such quality manner form and condition as they had before in the use." 2 *Black.* 333.

This statute it is true, applies only to realty. But what it does for realty, the common law does for personalty.

If then, Robert Bowman, under the codicil became "seized" of, or entitled to, the property, in trust for Wm. H. Long, the estate of Robert in the property, is to be "deemed to be in" William; this, by the statute, so far as the property is realty, and by the common law, so far as the property is personalty. The statute and the common law together, *execute* the trust as to both.

The result is, that the *cestui que trust,* Wm. H. Long, took both the legal and equitable title, and that the testator's attempt to vest the legal title in a trustee, was a failure.

The appointment of the trustee being a failure, that appointment cannot be a thing to take the case out of the general rule aforesaid; namely, the rule which gives to the tenant for life in property the right to the possession of the corpus of the property, for his own use and enjoyment, during his life.

Of course, this rule must be subordinate to the rule that the *corpus* is to be so kept, that it shall be *preserved* for delivery to the remainder-man, on the termination of the life estate. The law has ways by which it can effect this object, and yet, not deprive the life tenant of the use and profits of the property, during his life. It can require him to give security for the forthcoming of the property, at the termination of the life estate.

It follows, that the answer to our question, is, that the guardian *was* entitled to the possession of the "corpus" of the legacy for the use of his ward; which possession, he was to keep until his ward became twenty-one, if he became twenty-one, and then deliver it to him to be held by him thenceforth in fee; or until he died, if he died under twenty-one, and then deliver it to the remainder-men.

This being the answer to the question, the answer disposes of all the other questions in the two cases.

For if the guardian is entitled to possession of the "corpus," he is, of course entitled to have the rents and profits; and if entitled to these for the use of his ward, they are his ward's, and he is not bound to accumulate them until it is ascertained whether the ward lives to be twenty-one years old or not.

The guardian having got possession of the property, is to administer it according to law. If it will be according to law for him to apply any part of it, to the education of the ward, or to the payment of lawyers' fees, he will then have it in his power so to apply it.

In the case of Long vs. Bowman the judgment is to be reversed; in the case of Bowman vs. Long the judgment is to be affirmed. This is the result.

Robert E. Dixon, adm'r &c., plaintiff in error, vs. **Adolphus S. Rutherford**, defendant in error.

An order authorizing the sale of property by a receiver, to raise money to pay taxes or for any other purpose, should specify the property to be sold; and should be founded upon satisfactory proof as to the necessity of such sale.

At the May Term, 1858, of the Superior Court of Muscogee county, Adolphus S. Rutherford as receiver of certain property belonging to the estate of Daniel McDougald, deceased, moved the Court on petition, for leave to sell some of the property of said estate, for the purpose of paying taxes on lands of said estate, in the States of Alabama, Mississippi and Arkansas. William Dougherty as the attorney of said receiver, stating that said Receiver had no funds in hand; that taxes were due on said lands, in said States, and that a portion of said lands had been sold to pay the taxes; and that the receiver had paid five or six hundred dollars of his own funds to redeem said lands, which were again about to be sold for taxes; and that a sale of said property was necessary; which said statements were not denied or controverted. Robert E. Dixon, as administrator of Daniel McDougald, objected to the granting of said order; and thereupon the Court after consideration, directed that the receiver have leave to sell a portion of the property placed in his charge as receiver, in the city of Columbus, after advertising the same in some public gazette, sixty days, to raise a sufficient amount of money, to refund the amount heretofore advanced by said receiver for the protection of said property; and an amount sufficient to prevent any further sale of sadi property for taxes. To the granting of which order, the said Dixon as administrator, &c., then and there excepted.

Jones & Jones; Wellborn, Johnson and **Sloan**, for plaintiff in error.

Wm. Dougherty, *contra*.

By the Court.—Lumpkin, J. delivering the opinion.

There are two objections to the order granted by the Court, in this case:

First: It is too vague and general. It specifies no particular property which is to be sold for the purpose of raising money to pay taxes. Under this indefinite authority, the receiver might sacrifice the most valuable real estate in the city of Columbus, to raise funds to pay taxes upon other real estate in Arkansas and elsewhere. The money had best be obtained otherwise, if possible. And if property must be sold for this purpose, let it be designated in the order.

Our second objection to the order is, that it is not founded upon sufficient proof. The receiver makes the application upon the bare statement of the complainant in the creditor's bill, and who is the solicitor of the receiver in the prosecution of the suit.

We hold that the evidence is too uncertain and unsatisfactory to warrant the order. It is set out in the bill of exceptions, that the statement upon which the order was granted, was not controverted or denied. Dixon as administrator of McDougald, was present resisting the order. And the *onus* was upon the party applying, to show by competent testimony, the necessity for passing the order.

Judgment reversed.

A. S. Rutherford, receiver, &c., vs. Seaborn Jones, Charles Cleghorn, and R. E. Dixon, adm'r, defendant in error.

Where money is admitted by a defendant in equity to a creditor's bill, to be in his hands, belonging to the estate of a debtor, it will be directed to be paid into Court and there kept or ordered to be vested, as the Court may judge best

In equity, in Muscogee county, May Term, 1858, Judge Worrill, presiding.

The complainant applied to the Court for an order, requiring the defendant Cleghorn to pay into Court by a given time, the amount of money admitted in his answer to be in his hands, belonging to the estate of McDougald, arising from the rent of a portion of the property mentioned in the deed set forth in complainant's bill. The Court refused to grant the order, and complainant excepted.

Wm. Dougherty, for plaintiff in error.

Wellborn, Johnson & Sloan, for defendant in error.

By the Court.—Lumpkin J. delivering the opinion.

We are clear, that so far as the defendant Cleghorn admitted by his answer, a balance of money in his hands belonging to the estate of McDougald, that the Court should have ordered the same to be paid into Court without waiting for a final decree, 1 *Smith's Chancery Prac. 2d American, from 2d London Edition, p.* 667; 6 *Ves*, 738; 8 *Ves.* 68; 3 *Bro, C. C.*, 365; 4 *Nyl. & Craig*, 165; *S. C.* 2 *London Jurist*, 911; 1 *Hopkins*, 274. And the fund will either be kept in the custody of the Court; or vested under the special order or discretion of the Court, as it may judge best.

Judgment reversed.

CHARLES CLEGHORN, plaintiff in error, vs. A. S. RUTHERFORD, receiver, &c. defendant in error.

A writ of error, to reverse a judgment, directing pleadings to be amended or a defendant in equity to answer over, is not entitled to much favor.

Where the answer of a defendant in equity is not full and complete, and that too, to the best of his knowledge, information and belief, he should be required to answer over.

In equity, in Muscogee county, May Term, 1858, Judge E. H. WORRILL, presiding.

Cleghorn, one of the defendants, filed an answer to complainant's bill; complainant filed twelve exceptions thereto. The Court sustained eleven of the exceptions, and ordered Cleghorn to answer over fully on a day in said Term, to which judgment of the Court, Cleghorn excepted.

WELLBORN, JOHNSON & SLOAN, for plaintiff in error.

WM. DOUGHERTY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Without stopping to point out the insufficiency in the answer of the defendant, or so much and such portions thereof, as are excepted to, we affirm generally the judgment of the Court, ordering the defendant to answer over. His answer should be full and complete, touching every matter and thing about which discovery is sought in the bill; and that too, to the best of his knowledge, information and belief. The co-defendants complied with the order of the Court, and filed their amended answers. Mr. Cleghorn should have done likewise. Cases like this, should meet with but little favor or encouragement. They delay justice, if they are not intended to thwart it.

I sincerely trust that another Legislature will not meet and adjourn, without prohibiting peremptorily a writ of error from being prosecuted to reverse a judgment, to amend pleadings, either at law or in equity; or requiring of a defendant in equity a full and complete answer.

Judgment affirmed.

Robert E. Dixon, administrator &c., plaintiff in error, vs. A. S. Rutherford, receiver, defendant in error.

The defendant having appeared and answered the bill, and litigated it for five years, an application to dismiss, because served by complainant, comes too late.

It is not in order to move to dismiss a bill for want of prosecution, when no *rule nisi* has been taken to speed the cause, and before all the defendants have answered, and where the defendants have acquiesced in all the delay that has occurred.

In equity, in Muscogee Superior Court, May Term, 1858. Judge E. H. Worrill, presiding.

Dixon, administrator, moved to dismiss the bill of Rutherford:

1st. Because the bill was served by Rutherford as Sheriff, and also, for want of prosecution, more than four Terms having elapsed from the filing of said bill.

The Court refused, and overruled both of said motions, and Dixon excepted.

For all the facts, see *Rutherford vs. Cleghorn et al. seq.*

Jones & Jones, for plaintiff in error.

Wm. Dougherty, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

There are two grounds in this writ, one for refusing to dismiss the bill because served by the complainant; and the other for want of prosecution, more than four Terms having elapsed since the filing of the bill.

The first objection comes too late, after five years; the defendant in the meantime, having appeared and answered the bill. The other is premature, all the defendants not having yet fully answered the bill. No rule has ever been taken against the complainant, to speed the cause. If there has been unnecessary delay in this case, it has been acquiesced in by the defendants, as the record demonstrates. The application to dismiss for want of prosecution, comes with rather bad grace from the defendants.

Judgment affirmed.

ADOLPHUS S. RUTHERFORD, receiver &c. plaintiff in error, vs. CHARLES CLEGHORN, SEABORN JONES, and ROBERT E. DIXON, administrator &c., defendants in error.

A defendant in equity, is entitled to a writ of error, to reverse the order of the Court below, sustaining exceptions to the sufficiency of his answer.

In equity from Muscogee county. Tried before Judge WORRILL, May Term, 1858.

This was a bill filed by Adolphus Rutherford, as receiver against Seaborn Jones, Charles Cleghorn, and the administrator of Daniel McDougald, deceased. Cleghorn, Jones, and Robert E. Dixon, administrator of Daniel McDougald, filed their separate answers to the bill. Complainant filed twelve exceptions to each of said answers. The Court sustained eleven out of the twelve exceptions, and ordered defendants to answer over, by a given day. Jones and Dixon answered over, but Cleghorn excepted to the decision of the Court, sustaining the exceptions as to his answer, presented his bill of exceptions which was signed and certified, and paid the cost, and gave bond and security as provided by law, before the day upon which he was required to answer over.

After the expiration of the time allowed to answer over, counsel for complainant moved that Cleghorn be attached for a contempt, in not answering over, or that the bill be taken *pro confesso* as to him; which motion the Court refused, holding that the bill of exceptions operated as a supercedeas of said order, as to Cleghorn. To which decision complainant excepted.

WM. DOUGHERTY, for plaintiff in error.

WELLBORN, JOHNSON & SLOAN, for Cleghorn.

By the Court.—LUMPKIN J. delivering the opinion.

The question in this case: A defendant in equity files his answer to the bill. Complainant excepts; his exceptions are sustained; and the defendant required to answer over by a given time, which failing to do, an attachment is moved which is resisted by the defendant, on the ground, that he has excepted to the prior order, requiring him to answer over; and that having given bond in the case, in terms of the law, the cause is superceded.

The chancellor refused to grant the attachment, and we hold correctly, according to the past practice of this Court upon this subject. Had not a writ of error been prosecuted at the time, it never could have been under the law as it now stands. The main question made by the bill, has not yet been tried; and it is very doubtful when it will be. Had the defendant waited till final judgment, more than thirty days having transpired from the adjournment of the Court, when the decision upon the exceptions was made, the defendant would have been remediless. The Legislature, not the Court, must apply the remedy; a remedy imperiously demanded. Let no case be brought up, until after final judgment; and not even then, so as to control the discretion of the Court below, in ordering a full answer. Jones and Dixon complied with the order of the Court, amending their answers. Why should not Cleghorn?

Judgment affirmed.

BENJAMIN F. DOZIER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] On the trial of an indictment for murder, the mere omission by the Court to charge as to voluntary manslaughter, is not a ground for a new trial.

[2.] Malice is a "deliberate intention, unlawfully to take away the life of a fellow-creature."—BENNING J.

[3.] On the trial of an indictment for murder, the jury differed among themselves as to what a witness swore on a material point.

Held, that the witness, if at hand, ought to have been made to restate his evidence on the point; if not at hand, that what had been taken down by the Court in writing as his evidence on the point, ought to have been read to the jury.

Murder, in Muscogee. Tried before Judge WORRILL, November Term, 1858.

Dozier was put upon his trial for the murder of David Gunn, and found guilty.

The defendant's counsel moved the Court for a new trial on the following grounds:

1st. Because the Court omitted altogether to charge the jury on the subject of voluntary manslaughter.

2d. Because the Court charged the jury "that every homicide is presumed to be malicious, and is, of course, murder, until the contrary appears; and the *onus* is on the defendant to prove the killing was of an inferior grade of homicide, or the jury must find him guilty of murder."

3d. Because the Court, in defining murder, said the word malice had a peculiar legal signification:—"It does not mean hatred, enmity, ill-will, malevolence, or anything of that sort. A man may kill another against whom he has no grudge or ill-will whatever, and the killing be with malice and be murder. For example, a man fires a pistol into a crowd of men and kills one he never saw before. This, in law, would be malice and be murder."

4th. Because when the jury returned for instructions, and said that they could not agree, because some of them thought that Elvira Wheeler testified that after Gunn struck Dozier, and after they had got into the yard, she ran to the door and cried out to them to quit; from which they inferred that Dozier had not had time for reflection. The Court told them that was a question of fact, and he could not assist them; and the counsel for the defendant asked that the witness might be sent for, or the brief of evidence referred to, to enable the jury to find a correct verdict, and the Court refused.

5th. Because the brief of evidence recorded is incorrect in an important thing: the remark of Elvira Wheeler referred to above, as is shown by her affidavit.

6th. Because in a difference between the prosecution and the defence, on a material fact, the defence prayed the Court for reference to the brief of evidence to settle the question, and the Court refused.

7th. Because the evidence, as taken down, was not read over to the witnesses for correction, if necessary.

8th. Because the principal witness, and only important one for the State, lived with, was regarded by herself and deceased as the wife of deceased, and so spoken of by deceased, under the promise of having the legal forms complied with as soon as they could afford it.

9th. Because of new testimony discovered since the trial, showing a peaceable disposition on the part of defendant, and a quarrelsome one on the part of deceased, and that defendant was industrious, and a hard working man.

10th. Because the verdict was not supported by the evidence.

Brief of the evidence.

Deceased was at the house of witness, Elvira Wheeler, after supper. Dozier walked out and deceased said some very insulting things to him. Defendant heard him, came back and asked him what kind of jaw was that to use in his presence. Defendant stood outside and deceased sat in the door; and if that was what he had come for, he had better go home, as he wanted nothing to do with him. Deceased raised his arm and struck defendant three blows with his fist; saw no weapon in defendant's hand. They then went into the yard and she heard deceased say he was dead; she and defendant got a light, and deceased was dead. Defendant had a knife; had had it that night cutting beef for supper, and laid it down on the bench; had it before the difficulty; don't know whether it was on the bench during the difficulty or not. Saw no person present before or after. There was blood on the knife. Deceased was wounded on the neck and lip. They were friendly. Dozier rented the house in which she lived. Defendant had promised to marry her, and she expected him to do so; she considered herself his wife. About fifteen minutes elapsed after deceased struck defendant before deceased said he was dead. Defendant came in the house and said he believed deceased was dead, and gave witness the knife.

Wright, the Coroner, testified that the wounds severed the large neck vein, and the knife fit the wound. Gunn was a feeble man, one hand almost useless, and defendant a stout man.

Another witness testified that defendant and E. Wheeler said there was no knife there; he was looking for one. Saw blood on Dozier, and signs of blood being washed out of his clothes. Defendant said it came from his finger; that he had cut his finger; the cut was trifling on his finger. Dozier was asked if he had on his own coat when he cut his finger, and he said yes; on pulling off his coat, blood was found on the back of his shirt. The knife was large.

The Court overruled the motion for new trial, and defendant's counsel excepted and assigns it as error.

JOHN A. JONES; E. W. MOISE by JOHN PEABODY, for plaintiff in error.

Solicitor General OLIVER, for defendant in error.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in overruling the motion for a new trial? This is the question.

We think, that there is nothing in the first ground of the motion.

[1.] Does it follow from the Courts' failing to charge in respect to voluntary manslaughter, that the jury mistook the law of voluntary manslaughter, and mistook it to the prejudice of the accused? By no means. The jury were the judges of the law, as well as of the fact; and that the Judge decides *right*, is the presumption until the contrary be shown.

It does not appear, then, that this omission in the charge, did the accused any harm.

Such an omission, is not one of the things made grounds for a new trial, by the new trial Act of 1854. *Acts of* 1853-1854, 46.

We can perceive nothing exceptionable, in the second ground—and pass to the third.

[2.] The Court told the jury, that malice "does not mean hatred, enmity, ill-will, malevolence, or anything of that sort." This is undertaking to say, not what malice is, but what it is not; and, *perhaps*, what is said, considered in that view, may pass. The words, "or anything of that sort," are, however, extremely broad. It would certainly be safest to follow the Code.

"Express malice is that deliberate intention unlawfully to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof."

"Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." *Cobb*, 783.

It is deducible from these two sections of the Code that malice in the abstract, is, *intention*—is, a "deliberate intention, unlawfully to take away the life of a fellow-creature."

We pass from the third ground with these remarks.

The fourth ground is, we think, a good one.

[3.] The jury differed among themselves, as to what the main witness swore on an important point. They informed the Court of this difference. The usual course in such cases, has been, for the Court to require the witness, if at hand, to restate to the jury his evidence on the point; if the witness is not at hand, to read to the jury what has been taken down in writing as the evidence of the witness, on the point. This course, we think, has been in pursuance of the law. It complies with the great rule of evidence, that the best evidence which the nature of the case admits of, shall be required, and when produced, shall be received. It does not impose on any juror, the duty of surrendering a clear conviction as to what it was he heard from the mouth of the witness when the witness was testifying. This is a matter it leaves to him.

In *Griffin vs. The State* (15 *Ga.* 479) the charge to the jury was; "Take the evidence as it has been read to you," &c.; and this Court held the charge wrong. Why? Because the charge amounted to saying, that this "*read*" evidence was the *best* evidence—better than the evidence *heard* from the mouths of the witnesses. But holding this, was by no means holding, that such "read" evidence—that is, the evidence taken down by the Court—is not admissible as *secondary* evidence.

Supposing the fifth ground true in point of fact, it does not make a reason for a new trial.

The sixth ground is: "Because in a difference between the prosecution and the defence, on a material fact, the defence prayed the Court for reference to the brief of evidence, to settle the question, and the Court refused."

Such "a difference" between opposing counsel, if requiring to be settled at all, ought not to be settled in a different manner from that in which a similar difference among the jury would have to be settled. But we are not prepared to say, that there is any law which requires it to be settled at all. As long as there is no such difference among the jury, of what consequence is it, that there is such a difference between the opposing counsel? If the difference between these is shared in by the jury, they can make it known, and then the witness will be recalled, if at hand; if not, the manuscript of his evidence may be read.

The seventh ground is not a reason for granting a new trial. We think, however, that it is highly important, on every account, that the "evidence as taken down" ought to be "read over to the witnesses for correction"; and that every other means ought to be taken, to render such evidence as perfect as possible. Why, it is needless to specify.

ay, that a case is not conceivable in
the evidence as taken down, might
r a new trial.

a competent witness for or against
for or against the husband. But this rule does not extend to the case of a man and woman living together in a state of fornication. That the two *contemplate* marriage, can make no difference.

There is nothing then in the eighth ground.

The newly discovered evidence is a small matter any way; and it might have been discovered in time for the trial, by the use of any diligence.

There is nothing, then, in the ninth ground.

It is needless to express an opinion on the tenth, which is, that the verdict was contrary to the evidence.

New trial ordered on one ground.

James J. Keaton and John R. Hampton, plaintiffs in error, vs. Wade C. Cox, defendant in error.

[1.] In an action against several persons on a note signed by one of them as "security," the *judgment* was against them generally, not specifying that it was against the latter as security, and the others as principals.

Held, That this omission in the judgment, was not a ground for an illegality.

[2.] *Held* also, That a failure by the plaintiff to observe instructions of the surety to make his money out of a principal is not a ground of illegality.

Illegality, and motion to set aside judgment and fi. fa., from Baker. Decision by Judge Allen, May Term, 1858.

Wade C. Cox sued James D. Hampton, James J. Keaton, and John R. Hampton, the latter as surety, and *judgment* was entered up against J. J. Keaton and J. R. Hampton generally, not *against one as surety*, and the other *as principal*. This judgment, was obtained in Baker county, where the parties resided at the time of the commencement of said suit. James D. Hampton moved to Florida before the commencement of the suit, and John R. Hampton moved to Dougherty county afterwards. Execution issued on the judgment and was placed in the hands of the Sheriff of Baker county, and while thus in his hands, John R. Hampton notified and charged him to levy it on the plantation of J. J. Keaton. Before it was or could be done, Benj. O. Keaton, to whom the same was transferred, took it from said Sheriff, carried it to Dougherty county, and it was by the Sheriff of that county levied on a negro man slave, the property of John R. Hampton. John R. Hampton made an affidavit of illegality to the execution, setting forth therein the foregoing facts, and on the trial of the same, the Court held them insufficient to restrain said execution from proceeding, and Hampton's counsel excepted.

J. R. Hampton's counsel then moved the Court to set aside the judgment on the above stated grounds, which the Court also refused, and Hampton's counsel excepted and assigns error on the exceptions.

STROZIER & SMITH, for plaintiff in error.

WARREN & WARREN, for defendant in error.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in overruling the affidavit of illegality?

It is true, that the judgment is general against Jas. J. Keaton and Jno. R. Hampton—not specifying, that it is against the latter as surety; but the statute does not require that the judgment should specify any thing in this respect. What the statute requires, is, that when "any security to any note,' "shall subscribe himself as security," it shall be held as evidence of his being such security, "and the plaintiff shall sue out original and *mesne* process, accordingly." *Cobb*, 594.

But if the statute did require the judgment to specify this, the omission to specify it, would be amendable. *Cobb*, 488.

[1.] There is nothing, then, in the first ground of the affidavit of illegality.

[2.] Nor is there any thing in the second.

In a *fi. fa.* against several defendants, the plaintiff has the right to make his money out of any of them, at his pleasure; and this, although it may be, that some of them are but sureties. The judgment binds equally, the property of all. This being the plaintiff's right, neither he, nor the Sheriff, is bound to regard instructions from one of such defendants who is only a surety, to make the money out of the property of another of the defendants, who is a principal. No law was read to show the plaintiff or Sheriff so bound.

Judgment affirmed.

R. B. McWHORTER, plaintiff in error, vs. T. J. McMURRAIN, defendant in error.

As the judgment granting a new trial, is not final, it is only in an extreme case, that such a judgment will be disturbed, by a reviewing Court.

Motion in arrest of judgment on *ca. sa.*, from Sumter county. Tried before Judge ALLEN, March Term, 1858.

At September Term, 1857, McWhorter obtained judgment against McMurrain, on which a *ca. sa.* issued. At the next Term McMurrain moved to set aside the same, upon the ground that he had filed a plea in said cause, and that said verdict was rendered upon an irregular call of the docket, and without notice to defendant.

Counsel for McWhorter moved to dismiss said motion, because it did not set forth any intrinsic matter appearing upon the face of the record, and that judgment cannot be arrested for matter not appearing upon the face of the record itself.

The Court refused to dismiss the motion, deciding that there might be other grounds than those intrinsic upon the record; that there might be such irregularity in obtaining the judgment, as would authorize the Court to set it aside. To which refusal and decision of the Court counsel for McWhorter excepted.

The Court then proceeded to hear evidence as to the facts alleged in the motion to set aside said verdict, judgment and *ca. sa.;* to which McWhorter's counsel excepted.

Thomas C. Sullivan testified as follows: Counsel were permitted to take confessions at any time during the Term, and when the attention of the Court was called thereto, the proper entry was made. At the heel of the Court the common law docket was called in its order, and where no defense was made, verdicts were taken. If there was litigation, or defense, or complex proof, the case was continued, and he was confident all the cases were thus disposed of.

Scarborough stated, that at September Term, 1857, the Court allowed counsel to take verdicts where there was no defense, without sounding the case. On the last day, the Court called the docket regularly, announcing, however, that no litigated case would be tried; knows nothing of this particular case.

N. A. Smith stated the same, but knew nothing about this case.

Willis A. Hawkins stated, that when the suit was brought, McMurrain employed Hawkins & McCoy to defend it, and at appearance Term, he made out and filed a plea; doesn't know that the Clerk saw it or filed it; which plea, if true, was a good defense to the suit; did not hear the case called;

presumes he and McCoy were in Court when the case was called, if called at all; their names were not marked on the docket until this (March) Term of the Court. To all which testimony McWhorter's counsel excepted.

Hawkins stated that the docket was called in an irregular manner, and verdicts taken without cases being sounded; don't know whether this one was sounded or not, but if it was, he and McCoy had no notice of it.

McWhorter introduced evidence and proved by the Clerk, that he could find no plea of file between appearance and trial Term; never recollected seeing any; and by Worrell, about the same as Sullivan and Scarborough proved, and also that he was confident all the cases at September Term, which were disposed of, were sounded at the time.

Snead, of counsel, stated, to his recollection, the case was called before the verdict was taken; that no counsel was marked, and he enquired of the Clerk if there was any plea filed, and the Clerk informed him there was not; thinks McCoy & Hawkins were present when the case was called.

The Court sustained the motion, and ordered and adjudged that the verdict, and judgment and *ca. sa.* be set aside, and the case stand as at trial Term before verdict was taken.

To which counsel for McWhorter excepted, and upon these several exceptions assign error.

SNEAD & ALLEN, for plaintiff in error.

McCOY & HAWKINS, for defendant in error.

By the Court.—BENNING J. delivering the opinion.

A judgment granting a new trial, is not final. When, therefore, the Court in which a verdict is rendered is dissatisfied with the verdict, and grants a new trial, the grant will not be disturbed by a reviewing Court, except in an extreme case.

And it must be admitted, that the present case comes very near to an extreme case. Indeed, as the case stands, it comes quite to it. As the case stands, there is no affidavit of the truth of the plea; none of an expectation of ability to prove the plea on a new trial.

Therefore, we can only conditionally, affirm the judgment granting the new trial; namely on condition, that an affidavit of these two things be filed in the Court below by McMurrain within a reasonable time, to be judged of by that Court.

Judgment affirmed conditionally.

ANDREW CHAMBLESS, adm'r, &c., plaintiff in error, vs. HUDSON D. TABER, defendant in error.

Where the defence at law is legal, and not equitable, and the means of establishing it, by proof, ample, Chancery will not interpose by injunction to stay the proceeding.

It is the right of the party to amend, but the *duty* of the Court to prescribe the terms; and Courts should exercise this duty so as to discourage negligence and delay in the management of cases.

Equity, from Worth county. Injunction. Before Judge LAMAR, at chambers.

Hudson D. Taber, the complainant, alleged in his bill, that on the 18th March, 1849, he purchased of Daniel Harris, lots of land Nos. 204 and 205, in the 15th district of Worth, for which he received the said Harris' deed, and he was then and there in the possession of the same. That said Daniel Harris executed said deed to complainant under and by virtue of a deed to him from Jesse Harris, the father of said Daniel, which said deed was left at Vienna to be recorded by the Clerk, when the same was destroyed by the fire, in the burning of the court-house there in the year 1847. That complainant took possession of these lots under the deed from said Daniel, and continued therein until the present time, and that said Jesse Harris commenced his action of ejectment in the Superior Court of Worth county, for the recovery of said lots, and as complainant is advised and believes, for the fraudulent purpose of getting the land, he well knowing that the legal title was in said Daniel, and that said Daniel had sold the same to complainant, and that on the trial of said ejectment cause, verdict was rendered against complainant, in favor of Jesse Harris, for said premises and *mesne* profits, and complainant entered an appeal. That said Jesse died, and Andrew Chambless was duly appointed administrator of said deceased, and that said ejectment cause is now pending in the name of said administrator.

The bill prays for discovery, and an injunction against said ejectment cause. The same was granted by Judge LAMAR, and to the granting of said injunction and sanction of said bill, defendants by their counsel except and assign error.

LOTT WARREN, for plaintiffs in error.

PETER J. STROZIER, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

We must think the injunction in this case was improvidently granted. We concede that the injunction was applied for in time, under the 9th rule of Chancery Practice; that is, thirty days before the Court to which the bill is returnable. The affidavit was made five days before the time had expired. Still it was a dilatory proceeding, considering the length of time this suit had been pending.

But why resort to equity when, from any thing that appears in the bill, the remedy at law was complete? The defendant does not allege that any discovery is needed to establish his deed. Jesse Harris is dead, and he cannot. It does not appear but that the subscribing witnesses to the deed from Jesse to Daniel Harris are in life; or other persons fully able to establish the deed if it ever existed, either in a direct proceeding instituted for that purpose, or to prove its contents on the trial at law, so as to defeat the action of ejectment against the complainant.

Why then resort to Chancery? This is a legal, and not an equitable, defence, and no discovery is sought.

The order of the Court granting the injunction is reversed. Nor should any amendment to the bill be allowed, except upon terms; namely: the payment of cost and requiring the amendment to be made at an early day, so as to prevent delay.

Judgment reversed.

JOHN M. GUNN, plaintiff in error, vs. RICHARD DAVIS, Deputy Sheriff, defendant in error.

Where a debtor in *ca. sa.* gives a bond under the prison-bounds Act, and escapes beyond the limits, but remains in the county, the Sheriff is not liable for not re-arresting and committing him at the expiration of the six calendar months. The creditor's remedy is upon the prison-bounds bond.

Rule against Sheriff, from Randolph county. Tried before Judge KIDDOO.

The rule recites, that Davis, having in his hands a *ca. sa.* against one Shannon, in favor of plaintiff, arrested him, and took bond and security for prison bounds, after Shannon had been delivered up by his former security on the *ca. sa.* bond, and had been ordered to jail by the Court. The term of the bond expired, but the Sheriff did not remand and commit him. He was ordered to produce the *ca. sa.*, and show his actings, &c., and show cause why he should not pay plaintiff the amount due on the *ca. sa.*

Davis answered, admitting the facts recited in the rule, which are as above; and further, that before the six months, the term of the bond expired, the defendant, Shannon, forfeited his bond by going beyond the prison bounds; that his security was insolvent, but that he, defendant Davis, did not know it at the time. That Shannon was still in the county, but that he had not re-arrested him, thinking plaintiff's remedy was upon the bond.

The Court refused to grant the rule to make the Sheriff pay over the money to the plaintiff, upon two grounds:

The Sheriff had a right to take from Shannon, bond to keep within prison bounds; and because, after the six months expired, the Sheriff was not bound to commit Shannon to jail, for the reason that the bond was forfeited, and the liability of the security was fixed.

To which ruling of the Court, plaintiff by his counsel excepted and assigns error.

Douglass & Douglass, for plaintiff in error.

Perkins & Tucker, for defendant in error.

By the Court.—**Lumpkin** J. delivering the opinion.

A. is arrested under *ca. sa.*, and gives bond to take the benefit of the honest debtors' Act. At the next Term of the Court he fails to move to be discharged, and is ordered into custody. Under the Act of 1820, he gives bond to the Sheriff to take the prison bounds. He goes beyond the limits, remaining however in the county. Is the Sheriff liable, by rule, for not re-committing the debtor at the end of the six calendar months?

Had he remained within the bounds, this Court has held that such failure on the part of the Sheriff, would subject him. But in case of escape—and every departure beyond the bounds is an escape, the order of the Court being to commit merely—does not authorize a recapture beyond the bounds; and that the creditor's remedy is upon the prison-bounds bond.

Judgment affirmed.

LAZARUS TILMAN, plaintiff in error, vs. JOICY STRINGER, defendant in error.

The complainings of negroes, as to their diseases, are admissible in evidence.

If unsound property is of any value either at the time of sale or afterwards, the purchase money with interest is not the proper criterion of damages.

Although the Court charge the law erroneously, still, if the verdict of the jury be right, no new trial will be granted.

Debt, from Harrris county. Tried before Judge WORRILL, April Term, 1858.

Joicy Stringer purchased of Tilman a negro woman which was warranted to be sound; upon which warranty the said Joicy brought this action, alleging a breach of the same.

On the trial it appeared from the testimony of H. D. Williams that plaintiff was a widow, and her late husband was witness' nephew; knew the negro woman about whom this suit was instituted; supposed her to be some forty or forty-five years of age; was not present when she was purchased. Lived very near plaintiff and was sometimes consulted by her in reference to business. The negro woman was left by defendant with plaintiff for a short time before the purchase, on trial; perhaps a week or two, not positive how long. At request of plaintiff he looked at the negro before the sale; and at that time merely looking at her, he did not discover she was diseased; she was apparently a tolerably good looking negro, and quite *pert*. Some five or ten days after the purchase he saw her again, and then thought from her appearance and actions that she was not well, and undertook to inquire into the matter. She then complained of pains in her back and head, and side and shoulders.

Counsel for defendant objected to any of the negro's sayings about her situation. The Court overruled the objection, and defendant's counsel excepted.

The negro was in the field at this time, but seemed to be lagging behind the other hands. After this he saw her two or three times a week, and she was frequently complaining; did not have a healthy appearance, looked rather *ashy;* during a year or two after the purchase grew worse and worse; sometimes would lie up; that he had frequently seen her up to last Christmas, and knowing said negro as he did, with the disease on her, in his opinion she was at this time of no value. That to one who did not know her as he did, but from her appearance, her age, &c., and in a sound condition, she probably would bring in the market some four or five hundred dollars at the time he first knew her.

Plaintiff read the bill of sale of said negro from defendant to plaintiff, bearing date January 18th, 1854, whereby the defendant acknowledged the receipt of nine hundred dollars for said negro, aged thirty years, and warranting her sound in body and mind.

On cross examination of said Williams, it appeared that the plaintiff paid for said negro by giving a note of nine hundred dollars, payable 25th of December after the sale, without interest, and that said note had been paid.

Erastus C. Hood testified he was a practising physician; that he was called in some two years after the sale, to examine said negro as to her condition. Made no particular physical examination; looked at her tongue, but most of his information was derived from her own statements. She said she had pains in her head, back and side, and great difficulty in urinating, and it was attended with some pain. She was feverish, and her tongue was furred. That his medical opinion was, from the symptoms thus detailed to him, that the womb of the negro was affected, probably a tendency to *prolapsus;* that the urinary organs were affected with probably some inflammation of the bladder, and womb, and kidneys; he did not prescribe for her, for he thought to cure her would require a course of treatment for some time. Could not state how long she had been diseased, but thought it was chronic, and not of recent origin; but could not say she was diseased at the time of the sale to plaintiff.

From her appearance if sound she was probably worth five or six hundred dollars. In her diseased condition, as he saw her, could not say she was worth anything.

Stringer testified, some year or more after the sale she was sent by plaintiff to Hamilton, and exposed to sale at public outcry. She was put up, and nothing said about soundness or unsoundness; and under the instructions, not to let her go under $700—and the highest bid being $560, she was bid in for plaintiff. During the crying of bids, some drunken fellow came up and said he had a title to the negro, but witness had a statement made that the title was good.

Edwards, the son-in-law of plaintiff, testified that he saw her about twelve months after the purchase; she was frequently complaining; she was not healthy, and at the request of plaintiff, he told defendant to take the negro back, which defendant declined. The negro was not present at the time. She worked some, and sometimes would lie up, complaining. If sound she would probably bring from $500 to $700. In her present condition might bring $200 or $300, but as for himself, he thought she was worthless.

Defendant's counsel objected to negro's statement of her condition. Court overruled objection, and defendant's counsel excepted.

Eldridge Winslow testified by interrogatories that he once owned the negro, sold her to defendant, and she was sound so far as he knew. Owned her about a year; she sometimes complained of head ache, back ache, or something simple, of that sort—not enough to have a physician called. Bought a plaster for her when she complained of back ache, and heard no more complaint from her for the ten months after he owned her; gave $450 and sold her for $475. Considering her age, does not think the complaint injured her value, at least while he owned her, and got what she was worth had she been sound; never missed a days' work while he owned her. Thinks her age in 1843 38 or 40 years.

Thomas J. Sears, for defendant, testified that some three years after the sale he examined the negro; looked at her, felt her pulse, looked at her tongue, but relied for his opinion principally on her statement. She had pains as described by other witnesses, and in the abdomen, and what she termed a pressing or falling down sensation as she termed it; trouble in urinating—her monthly periods very irregular, coming sometimes only once in two months, or sometimes in a few days; thinks it was caused from change of life, she being about 45 years old, and the change one which all females go through about that period, from 40 to 50 years of age. Her appearance did not particularly indicate disease; would be worth, if sound, $600 or $700. In her present condition would be worth from $100 to $300.

Defendant read in evidence interrogatories of Richard A. Tilman. The negro was sound when defendant sold her. He knew her. Saw her about two years after the sale; she did not look as well as when owned by defendant. She never lost any time or complained, up to the time defendant sold her while he knew her, and he lived on the same premises where she did. Is the son of defendant, and 24 or 25 years old; is not a physician, does not remember whether defendant gave $400 or $500 for her, and sold her for $800 or $900.

Defendant read the testimony of Eldridge Winslow and his wife: They knew the negro, once owned her. Knew her last in the possession of Tilman. Knew her three years, and she was sound whilst in their possession, 10 or 12 months. She complained a little of head ache, back ache, or something of that sort; never had a physician with her. Constitution was good so far as they knew. Know nothing of her since she went out of their possession.

The Court then charged the jury that if they believed the negro was diseased at the time of the sale, and from such disease was now of no value, then they must find for the plaintiff the amount paid for her with interest from the time of the sale; but if they believed the negro was diseased at the time of the sale, and that in consequence of such disease had since become and was now of less value, then whatever they believed her to be worth now, that amount they must deduct from the whole amount paid, and find a verdict for the balance, with interest from the time of the sale. But if they believe the negro was diseased at the time of the sale, and in consequence of such disease had become now of no value, then they would find for plaintiff the whole amount paid for her with interest from the time of the sale, though it should be proven that at the time of the sale, or at some subsequent period, she was worth something; but if they believe the negro was not diseased at the time of the sale, then they must find for the defendant.

The jury found for the plaintiff $900 and cost of suit.

The defendant moved the Court for a new trial on the grounds:

1st. That the Court erred in admitting the evidence of witnesses in regard to the sayings and complainings of the negro in relation to her condition.

2d. Because the Court erred in its charge to the jury.

3d. Because the verdict was contrary to law and the charge of the Court.

4th. Because the verdict was without evidence, was contrary to the evidence, and against the weight of evidence.

5th. Because the jury found a gross sum, without discriminating between principal and interest.

The Court overruled the motion for a new trial, and the defendant's counsel excepted and assigns the same as error.

INGRAM & RUSSELL; AND MOBLEY, for plaintiff in error.

D. P. HILL, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

But for the finding of the jury, it would be difficult to sustain the judgment in this case. The charge of the Court was wrong, but the verdict of the jury was right. The Court instructed the jury that if they found that the negro was unsound at the time of sale, and had become entirely worthless since, they should give their verdict for the whole amount of the purchase money with interest, "notwithstanding the negro may have been of some value at the time of sale or afterwards."

The price paid for the negro was $900. The verdict of the jury was for that amount *without interest.* The jury therefore, must have set off the hire against the interest. In other words, found that the hire of the negro was worth the interest on the purchase money. Considering the negro of some value, they not only allowed the defendant something, but a pretty full price; at the rate of $63 per year for the use of the negro.

This sum seems large; but it is what the plaintiff paid for the woman. If the price be exorbitant, the defendant fixed it. That was the estimate put by him on the property at the time of sale Too high, we have no doubt; still, it was exacted by the defendant and paid by the plaintiff. And consequently constitutes the proper basis for estimating the damages in this case.

Although the charge of the Court be wrong, still if it does not control the jury, but they find contrary to it, it is not ground for a new trial, even under the New Trial Act of 1853–4.

We find no merit in the other grounds.

According to our understanding of the evidence, the verdict in this case is based upon the fact that an offer was made, and refused, to return the negro. The verdict can only be sustained upon that hypothesis.

We shall affirm the judgment, then, provided the plaintiff will, within a reasonable time, return the woman to the defendant, or offer to do so.

Judgment affirmed conditionally.

JOHN McLEOD, plaintiff in error, vs. JOHN BOZEMAN, defendant in error.

The title acquired by the purchasers under the Act of 1833, (*Acts* 37,) authorizing the sale of certain fractions, was not affected by the sale of the same fractions, under the forfeiting Act of 1847.

Ejectment, from Lee county. Decision by Judge ALLEN, March Term, 1858.

The facts in this case were agreed upon and submitted to the Judge for his decision, and are as follows:

The fractional lot in dispute was sold by Wm. J. Davis agent of the State, on the 5th day of May, 1834, and afterwards, on the 21st day of May, 1835. the whole of the purchase money was paid. The plaintiff's lessor is the transferree of this certificate of purchase, and the defendant was in possession at the time of the institution of the suit, claiming title to said premises as follows:

The Legislature passed an Act on the 30th December, 1847, declaring that all lots of land which had been sold, and the grants had not issued therefor, should revert, and that such fractional lots should be sold. Afterwards, in compliance with the law, this fraction was sold; and afterwards on the 11th July, 1850, the State issued a grant to the purchaser and the defendant claimed under this purchase' Judge Allen decided that the plaintiff was entitled to recover. To which decision defendant's counsel excepted, and assigns the same as error.

Slaughter & Ely, for plaintiff in error.

Vason & Davis, for defendant in error.

By the Court.—Benning J. delivering the opinion.

Bozeman, one of the plaintiff's lessors, received a certificate of purchase to the land in dispute, from W. J. Davis, acting under the authority of an Act of the Legislature, passed in 1833. Bozeman paid up the whole of the purchase money. The Act did not require him to take out a grant—it did not seem to contemplate a grant. It did not require him to pay any fees of any sort, or to pay any thing but the purchase money. In this respect, it differs from any Act in *pari materia*, which has been before this Court. *Acts of* 1833, 37.

The effect, then, of this purchase and payment of the purchase money, was to give Bozeman a complete equitable title in the land. Such an one as would be executed in him by the statute of uses. *Pitts vs. Bullard*, 3 *Kelly*, 17. Such a title is sufficient to bar an ejectment; (*id. ibid.*) and sufficient to support an ejectment. *Goodson vs. Beacham*, decided at Macon, January, 1858.

This too was a title derived from the State through its agent, by contract with him, as evidenced by his certificate made in accordance with the authority given him by the said Act of 1833. The certificate was, in law, the certificate of the *State;* as much so, as a regular grant signed by the Governor, is the grant of the State.

This, then, was the title of Bozeman; and this was the title the plaintiff relied on.

McLeod, the tenant, claimed under a grant made, or purporting to be made, in pursuance of the Act of 1847, for the sale of "undrawn lots," and "to limit the time for fraction purchasers, to pay for and take out grants for fractions." *Cobb Dig.* 709.

The first section of that Act is as follows; "That all persons who have purchased fractional lots in this State, under the law requiring them to take out the grants for said fractions, shall have until the first day of November next, to take out his, her or their grants."

But there is no law requiring the purchasers of fractions, under the said Act of 1833, to take out grants at all. That Act, as has been before said, is peculiar in this respect. Therefore, this first section of the Act of 1847, does not apply to the purchasers of fractions, under the Act of 1833. And the other sections are no broader than this first section.

It must follow then, that the authority to sell fractions, given by the Act of 1847, did not extend to the case of fractions that had been sold under the Act of 1833. And, consequently, that the sales and grants of these latter fractions, made under the Act of 1847, were void.

If so, McLeod's grant was void.

Still, it is a grant in due form, signed by the Governor and sealed with the great seal. Is not a Court bound to respect it until it is set aside? The case is peculiar. Here are two conflicting titles, both issuing from the State; one in the form of a certificate, the other in the form of a grant; and a Court is called upon to decide between them. In the case of two grants of the same thing, "a *scire facias* lies for repealing the" younger; (*Com. Dig. Patent F.* 4.) from which it would seem to follow, that the younger ought to be made to yield to the older, whenever and wherever the two come into conflict. It is said, too, that if a grant "be void in itself *non concessit* may be pleaded to it, without a *scire facias* to repeal it: as, if a commission be, that, upon a discovery of defective titles, a grant shall be made upon the warrant of the commissioners, without other warrant, and a patent is made by their warrant of a thing out of their commission." *Id.* (*F.* 1.)

We think, then, that we may take the law to be, that if two grants come into conflict before a Court, the Court must make the younger, if the Court thinks it void, yield to the older.

And why should not such a certificate as that in this case, stand on the same footing, in this respect, as a grant? It is as much the act of the State, as a grant is; it is as much founded on a valuable consideration, as a grant is. There seems to be no substantial reason why it should not.

Upon the whole, then, we think, that the title under the certificate, was better than the title under the grant, and that the Court below was right in holding, that the title under the certificate was sufficient to entitle the plaintiff to recover.

Judgment affirmed.

William H. Lamar, Sheriff, for use &c. of John D. Arnold, plaintiff in error, vs. David Foley, principal, and John O'Brien, security, defendants in error.

When a debtor in *ca. sa.* gives a prison-bounds bond under the Act of 1820, and afterwards applies for the benefit of the honest debtor's Act, but being convicted of fraud is ordered into the custody of the Sheriff to be imprisoned until a full and fair surrender of his property is made, this is a new commitment, and no action will lie on the prison-bounds bond for a subsequent escape.

Debt, &c. from Muscogee Superior Court. Tried before Judge BULL, May Term, 1858.

David Foley was arrested on a *ca. sa.* from Justice's Court, and gave prison bounds bond. In February Term, 1857, of the Inferior Court, he made application to take the benefit of the Act of 1823 "for the relief of honest debtors." Arnold suggested fraud in Foley's schedule, and the issue being tried, the jury found for Arnold. Afterwards, before the lapse of six mouths from his arrest, Foley passed beyond the prison bounds limits; hence the present action, plaintiff alleging in his declaration said passing the bounds as a breach of said bond, and thereupon his right to recover.

All these things were in evidence on trial, when, after plaintiff had closed, defendant moved a non-suit, which the Court sustained. Whereupon plaintiffs' counsel excepted and assigns error.

L. T. DOWNING for plaintiff in error.

INGRAM & RUSSELL for defendants in error.

By the Court.—LUMPKIN J. delivering the opinion.

A majority of the Court being of the opinion that the securities upon the prison-bounds bond were discharged by the proceedings which were had in this case, voted for affirming the judgment of the Superior Court in non-suiting the plaintiff. And while, for the sake of unanimity, I am willing to concur in the construction thus put upon our statutes passed in reference to this subject, yet I must, in justice to myself, say that I entertain strong doubts upon the point.

It is clear that a debtor in *ca. sa.* who has given bond to keep the prison bounds, is entitled to the benefit of the Acts passed for the relief of insolvents. (*Pamphlet Acts of* 1855-6, *p.* 153.) But suppose he fail in his application, as Foley did in this case—is he not remitted back to his former *sta-*

tus? That is, does he not remain in custody under the process by which he was committed, entitled to the privileges and subject to the conditions of the bond previously given, under the Act of 1820? *Cobb* 383. One of the stipulations is, that he is not to pass the boundaries prescribed by law "without being legally discharged." Here the party arrested sought to be released, as he had a right to do, but failed. In other words, he was not "legally discharged." Would it seem, therefore, that he remained in confinement under the original commitment? And that having departed subsequent to this time, he was guilty of an escape, and thereby forfeited his bond?

The other view of the question is, that by this proceeding under the insolvent laws, the prison-bounds bond was superceded, and that his imprisonment until a full and fair disclosure of all his property, money and effects was made, was a new commitment, and that the Sheriff having him in his custody under this order of the Court must deal with him accordingly.

This may be the better interpretation of the law.

Judgment affirmed.

STEPHEN C. DENHAM, plaintiff in error, vs. JAMES T. HOLEMAN, defendant in error.

[1.] The title to land of a purchaser at Sheriff's sale, cannot be prejudiced by an entry of a levy on personal property, and its dismissal by the plaintiff.

[2.] The head note to a case, whether put there by the Reporter or the Judge who writes out the opinion, is so far law only, as it is sustained by the judgment of the Court in the case.

[3.] To constitute adverse possession, it is not enough, for the claimant to go on the land, at intervals, cutting down trees, deadening timber, and building a cowpen, and then abandoning for a while the premises.

[4.] The inclosure in a field of a quarter of an acre of land, in the extreme corner, the field including portions of several adjoining lots, will not draw after it, the occupation of the whole lot.

[5.] Neither will the *intention* of the tenant to resume possession, be a compliance with the staute of limitations.

[6.] To constitute adverse possession, the tenant must either remain permanently upon the land, or occupy it, in such a way as to leave no doubt upon the mind of the true owner, not only as to who the adverse claimant is; but that it was his purpose to keep him out of the land.

[7.] Adverse possession, must be made up of acts, which are open, visible, notorious and *continuous.*

[8.] It is impossible to lay down any uniform rule, as to the relative value of positive and negative proof. It depends upon the opportunity of the witnesses for knowing, and the degree of attention which they bestow upon the subject.

[9.] The Term "beyond seas" in a statute of limitations, is equivalent to, *without the limits of the State* where the statute is enacted.

[10.] The constitutionality of the act of limitations of 1817, (*Cobb* 567,) examined and affirmed.

[11.] It is no ground of error, that in tendering a set of interrogatories, to be read in a case, the witness is unintentionally called by a wrong name by the party offering them: the interrogatories having been examined by the other side, before being submitted to the jury.

Complaint for land, from Sumter county. Tried before Judge ALLEN, March adjourned Term, 1858.

This was an action commenced 14th February, 1856, by Stephen C. Denham, against James T. Holeman, for lot of land No. 221, in the 16th district of Sumter county.

On the trial, it appeared that the land was granted to Stephen C. Denham: That Holeman was, and had been since about the year 1850, in possession of the land living on it, and cultivating it; that Denham had lived in the State of Tennessee, since December, 1831, and never left there long enough to visit Georgia; that he was there at his residence from 1845 to 1852, inclusive. It appeared by the testimony produced on the trial, by defendant, that a *fi. fa.* was issued from a Justice's Court against Benajah J. Sanford and James

H. May, in favor of Lewis Collins, on which were the following entries:

"Levied the within *fi. fa.* on twenty head of sheep, more or less. July 10th, 1845. JAMES T. HOLEMAN, L. C."

"Property sold for $2 00, and bought by Francis Mills, and the money claimed by an older execution, July 26th, 1845. JAMES T. HOLEMAN, L. C."

"Levied the within *fi. fa.* on twenty-seven head of sheep. August 7th, 1845. JAMES T. HOLEMAN, L. C."

"No property to be found whereon to levy this *fi. fa.* Oct. 17th, 1845. WM. FLOWERS, L. C."

"Levied the within *fi. fa.* on two lots of land, Nos. 221, and 222, in the 16th district of Sumter county, as the property of James H. May, this 17th October, 1845.

WM. FLOWERS, L. C."

"Levy dismissed by plaintiff, Oct. 6th, 1845.

JAMES T. HOLEMAN, Const."

"The levy of the above *fi. fa.* on two lots of land Nos. 221, and 222, in 16th district of Sumter county, this day sold to James T. Holeman. Lot No. 221, sold for $21 25, and lot No. 222, sold for $30 06¼, and money held up, by older *fi. fas*, December 2d, 1845.

G. M. WHEELER, D. Sh'ff."

The deed made by the Sheriff in pursuance of the sale of said land, and dated October 15th, 1850, was in evidence, and also a deed made by James H. May, to said Holeman, for the North half of the lot No. 221, in said 16th district, dated July 13th, 1840.

And also, a deed made by said Stephen C. Denham to Josiah Bradley in Wilkinson county, Georgia, on the 1st day of November, 1829; witnessed by James G. Bisdand and John R. Wells, J. P.

G. M. Wheeler testified: That he as Sheriff sold the land and made the Sheriff's deed to Holeman; that Holeman moved on the land in the latter part of the year 1849, or first of the year 1850; that a deadening had been made and a horse lot built on said land in 1847 or 1848. Holeman passed his, witness', father's house some time in 1849, and said he was going on to the lot. He claimed it from the time of the Sheriff's sale up to 1850, he lived, however, in 1848 and 1849, in the 17th district. In answer to the question "who was in possession of lot No. 221, in the 16th district, in 1848 and 1849;" the witness answered, "nobody." On cross examination, said that nobody was living on the land in those years.

A. W. Wheeler testified: That Holeman moved on the land in January, 1850; in 1847, he made a deadening and built a horse lot on it. The witness cultivated a half or quarter acre in the corner of said lot which was fenced into a field made in the corner of four lots. He took possession of this field in March 1849, from Mrs. Driver, renting it from her. He asked and received Holeman's permission to cultivate the enclosed part of the lot No. 221; did it to avoid a difficulty with him, he being a curious man, and because he claimed the land, and witness did not know but he might come and take his crop. Holeman lived in 1847 and 1848, in the 17th district.

Lewis Collins testified: That Holeman made a deadening and built a horse lot on the land in 1847 or 1848, moved on it last of 1849, or first of 1850, and worked on the land at intervals during the time. There was a fire in the Spring of 1848, the deadening was prior to that fire.

Defendant's counsel then read as the interrogatories of Winfield Livingston, those of Green Robinson, and the mistake was not perceived until counsel for plaintiff received them to make up a brief of evidence. They were commented on by counsel on both sides.

Robinson testified in his answer: That the defendant Holeman went into possession of the land in the latter part of the year 1847, or early in 1848; first he occupied lot 221, cut down timber, cleared land and built fences, and has been in possession of it ever since. Did not know the month or day, or upon what part of the lot these things were done, and does not know the exact lines of the lot.

Plaintiff then introduced—*Giles*, who testified: That he moved in the neighborhood of this lot in November, 1849, and Holeman was not in possession then, but that he moved on the lot in the latter part of 1849 or first of 1850.

Moses Driver testified: That he was well acquainted with the lot during the years 1847, '8, '9 and '50. Holeman camped on the lot in 1847 or 1848, while building the horse lot; staid there about two weeks; lived in the 17th district, was on the land at intervals working; not more than twice he thinks. The half or quarter acre named by A. M. Wheeler, was enclosed by witness for his mother, in her field, on an adjoining lot, without regard to the consent or claim of Holeman, and not as tenant or lessee of Holeman. The acts spoken of by witness, were continuous from time to time.

Mrs. Anthana Driver testified: She was well acquainted with the place. Some two years elapsed between the deadening of the trees and building on the lot by Holeman, and his settling on it to live. If he was in possession or exercised any other acts of ownership, or did any other work until he moved there, she did not know it; and thinks she would, as she lived in the neighborhood, and passed there frequently.

Plaintiff then read in evidence a certificate from B. B. DeGraffenreid, Secretary of the Executive Department of the State of Georgia, proving that the books of that department did not contain the name of John R. Wells, as being a Justice of the Peace in Wilkinson county, in the year 1829.

The testimony here closed, and the jury returned a verdict for defendant. Whereupon, plaintiffs counsel moved the Court for a new trial, on the following grounds:

1st. Because the Court permitted a *fi. fa.* issued from a Justices Court to be read in evidence as color of title, when a levy had been made upon personal property and undisposed of before the levy was made on the land.

2d. Because the Court refused to allow plaintiff to plead *non est factum* to a deed purporting to have been made by him to the lot of land in dispute.

3d. Because the Court remarked in the hearing of the jury, while counsel for plaintiff was reading the head note in the case of *Byrne vs. Lowry*, 14 *Ga. Rep.* 27, that the said head note was prepared by the Reporter, and was not *per se* authority, and could not be relied on, unless supported by the body of the decision.

4th. Because the Court in charging the jury the second request of plaintiff's counsel, which was as follows: "That if Holeman took possession of the land in dispute, and kept possession for a while, and then left the land with the intention of returning to it after some time, and resuming possession, and went to his house which was some miles from the land in another district, and resided there some time, and then returned and resumed possession of the land, the statute of limitations did not run in his favor during his absence from the land, and that it only began to run in his favor at the time he returned to the land," remarked, that the leaving the land as referred to, must be the same as an abandonment of the possession, and that the resuming possession showed that the leaving was not an abandonment.

5th. Because the Court refused to charge as requested by plaintiff's counsel, that if the one-fourth acre cultivated by A. W. Wheeler in 1849, was enclosed into a field of other parties on another lot of land without the privity or consent of Holeman, and that Wheeler in 1849, rented this field and cultivated this one-fourth acre as a part of said field, merely asking Holeman's consent to prevent a difficulty with him, then Wheeler's possession of this one-fourth acre cannot benefit Holeman in this suit.

6th. Because the Court refused to charge as requested by plaintiff's counsel, "that if the plaintiff has resided out of the State from a period anterior to the commencement of Holeman's possession and the grant of the land, to within three years before the filing of this writ in this cause, the statute of limitations does not run against him, and defendant cannot claim a statutory title," but instead thereof, charged the jury that the second section of the statute of 1817, entitled an Act, amendatory and explanatory of the statute of limitations in this State, passed the 7th December, 1805, so far as it regards idiots, lunatics and infants, was constitutional, and that the statute of limitations did run against non-resident plaintiffs in real actions.

7th. Because the Court refused to charge as requested by plaintiff's counsel, that Wheeler's cultivation of the one-fourth acre enclosed in Driver's field, was not such actual possession by Holeman of a part coupled with a claim of the whole, as will perfect title in him.

8th. Because the Court charged that if the jury believed from the testimony, that the defendant more than seven years prior to the bringing of the suit, took possession of the premises by clearing land, deadening timber, building fences and shelters, and from year to year continuously occupied the same by such means or by actually living on the same, and all this under color of title, they must find for the defendant.

9th. Because the Court charged the jury, that if they believed that even one-fourth of an acre of the land was cultivated by Wheeler avowedly, and openly, as tenant of defendant, that such cultivation and possession was the same as if defendant had himself done it, and if the next year defendant moved on the premises, and his possession with Wheeler's was seven years, plaintiff cannot recover.

10th. Because the Court charged, that if the defendant took possession in 1847 or 1848, and has never abandoned the same, but has continued the possession by such acts as the nature of the property allowed, up to this time, the jury must find for the defendant.

11th. Because the Court charged, that it was not necessary that a man shall live upon land or stay all the time upon it to constitute adverse possession; it is sufficient, if he takes possession, and does not abandon or give up the possession.

12th. Because the Court charged, that the evidence of one witness swearing positively, is worth more than the negative evidence of half dozen witnesses; so if the jury believe that Livingston testified that defendant built fences and cleared land, and continued in possession up to the present time, that would override the evidence of half a dozen that did not know of the act of possession.

13th. Because the counsel for defendant tendered a set of interrogatories as the interrogatories of one Wingfield Livingston to the plaintiff's counsel, and read them when they were the interrogatories of one Green Robinson.

14th. Because the jury found contrary to law, contrary to evidence and contrary to the weight of evidence.

The Court overruled the motion for a new trial, and counsel for plaintiff excepted, and thereon assign error.

Smith & Crawford, for plaintiff in error.

McCoy & Hawkins, for defendant in error.

By the Court.—Lumpkin, J. delivering the opinion.

This writ of error is prosecuted to reverse the judgment of the Court below, refusing to grant a new trial in this case.

[1.] It is complained in the first place, that the Court erred in allowing the *fi. fas.* to go in evidence under which the land was sold, for the reason that the entries on the executions showed that they were satisfied, before the land was levied on.

The facts upon which this objection is founded, are these:

Twenty-seven head of sheep had been levied on, and the levy dismissed by order of the plaintiff.

Whatever effect this may have had, if any, in a contest between a security and the creditor, it does not apply in an issue like this, between the purchaser and the defendant in ejectment.

The second ground is abandoned.

[2] As to this assignment, while it is not true that the Reporter puts the head notes to the cases; it is true, that the head note is not law, except so far as it is warranted by the judgment of the Court upon the facts of the case. We must say however, that the head note in the case cited, to-wit: *Byrne vs. Lowry*, 14 *Ga. Rep.* 27, was fully justified by the case.

[3.] The next seven exceptions may all be considered and disposed of together. And they bring up the law of this case arising upon the proof.

It is conceded, that the defendant never went into the actual possession of the premises in dispute, until about Christmas 1849. To make his statutory title available for his protection, the adverse possession should have commenced as early as February, 1849; this action of ejectment having been brought in February 1856. Now, the testimony is, that for several years, the defendant residing some miles off, did at intervals go upon the land, cutting down trees, deadening timber and fencing in a cowpen, which had fallen down. At what time he began to build the house which he subsequently occupied, does not affirmatively appear.

[4.] It is further in evidence, that in 1849, Mr. Wheeler rented a small field of a Mrs. Driver, which took in the corners of four adjoining tracts of land: and in this field was included about a quarter of an acre of the land in dispute. Wheeler was not the tenant of Holeman, as assumed in one of the charges of the Court. True, he states, that when he rented the land of Mrs. Driver, he spoke to Holeman, knowing him to be a "curious man," about this small piece of ground, which he claimed, as he did not wish to get into any trouble with him, still he rented the field of Mrs. Driver, and was her tenant.

[5.] Now, the Court held, that these several acts of trespass, repeated at different periods, indicated the intention of the defendant, to return to this land, and authorized the jury in finding, that his possession was continuous as well as adverse.

[6.] We do not so hold. To constitute adverse possession, the tenant must either remain permanently upon the land, or else occupy it in such a way, as to leave no doubt on the mind of the true owner, not only who the adverse claimant was, but that it was his purpose to keep him out of his land.

[7.] Suppose Denham had taken possession of this land, during the long intervals that it was abandoned by Holeman? Could he not have done this? Then he was not ousted of his right of entry by the successive trespasses committed by Holeman. Adverse possession is to be made out by acts which are open, visible, notorious and *continuous*; and does not depend upon the secret purpose or intention of the intruder; that he will return at his convenience, sooner or later, and re-occupy the land.

Neither is it true as intimated by the Court, that Holeman occupied the land in the only way of which it was capable. It was fit for planting and for nothing else. Why could it not have been cultivated? It was neither a gold mine, nor a turpentine forest.

As to the possession by Wheeler, of the quarter of an acre; in the first place, he did not hold as the tenant of Holeman. His possession therefore could not be reckoned to Holeman's account. Besides, in the second place, how could the inclosure of a quarter of an acre of this land, at one corner, in a field which took in a portion of three other tracts, give notice to the owner, that his lot of land was in jeopardy? He may not have thought that any of his land was inclosed in this field. In this case, the field drew after it the few roods and not the occupancy of the few roods, the whole lot.

[8.] As to the charge respecting positive and negative testimony, no general rule can be laid down respecting it. It depends upon a variety of circumstances, such as the opportunity of the witnesses for hearing, the attention being directed to the matter, &c. I say to-morrow,—I expressed such and such views, in delivering this opinion this morning. The crowded bar, who listened to it, testify in a body, that they did not so hear and understand me. Engaged in listening intently as they are, who shall be believed? It would be quite different by and by, when they separate into groups over the Court-room. If I should swear that an attorney who is addressing the Court, and to whom I am listening, said so and so, and the same careless auditors were to testify that they did not hear him. If the neighbors living around this land swear, that Holeman did not occupy it, it is just as good as the evidence of others, that he did. For the question of notorious possession, depends upon facts capable of being equally well known to each set of witnesses.

[9.] We think the Supreme Court of the United States gave the correct exposition of the Term, "beyond seas," in 3 *Wheaton* 541, and that the decision in 9 *Sergeant* & *Rawle*, was upon different words.

[10.] But is the Act of 1817, constitutional? Judge ALLEN held, that it was. Mr. Smith, the counsel of Mr. Denham, assails it upon the ground, that the body of the Act does not correspond with its title. Mr. McCay, the attorney of Holeman, not being able satisfactorily to reconcile this supposed repugnance, denies, that this or any other Court has the power to declare an Act of the Legislature unconstitutional.

This has ceased to be an open question in the Courts of this country. It underwent a thorough discussion immediately after the establishment of the State governments in every State of the Union; and never received the sanction of a single judicial tribunal in the United States; see *Beall and others against Beall*, 8 *Ga. Rep.* 210; and has long since ceased to be agitated any where else, except in Georgia, where nothing it seems is ever to be considered as settled. Even the Legislature itself, long before the organization of this Court, instead of resisting this right, as assumed to be exercised by the Courts, did not hesitate to re-enact the law of claim and other statutes, so as to make them conform to this constitutional requirement. We deprecate such discussions. They consume time which might be much more profitably employed. Instead of wasting strength upon these radical doctrines, which have become threadbare, let us rather address ourselves to the law points, in cases, which must control the judgment of the Court. Such is the uniform habit and praiseworthy example of the most successful practitioners at the bar.

But notwithstanding the elaborate argumentation bestowed upon this point; is there in fact any antagonism between the title and the body of the Act of 1817? We think not?

The title is in these words: "An Act amendatory to and explanatory of the statute of limitations in this State, passed the 7th of December, 1805, so far as it regards idiots, lunatics and infants." *Cobb* 567. Now, the first section of the statute directs how it shall be construed, so as to favor idiots, lunatics and infants. The second section which it is insisted is unconstitutional, because not embraced in the title, simply provides, that no privileges shall be extended to non-resident plaintiffs, beyond those enjoyed by our own people. And this is the whole body of the Act. Let us now read the title as it should be read, for the purpose of ascertaining its true meaning: "An Act amendatory to the statute of 1805, and explanatory of that Act, so far as it relates to idiots, lunatics and infants." It will thus readily appear that the conformity is complete. The first section explanatory to the extent stated in the title, and the second section amendatory.

It is suggested by Mr. Prince the compiler, that the Act of 1805, is repealed by the Act of 1806; and was therefore not in force, as the statute of limitations in this State in 1817, and consequently could not have been the subject of amendment. The provisions of the Act of 1817, however, he admits, are equally applicable to the limitation Acts, which were then in force.

I am not entirely convinced, that this annotation is correct. The third section of the Act of 1806, revives to be sure, all Acts and parts of Acts *which militate against it.* But as remarked before, there being nothing in the Act of 1805 militating against the provisions we are considering, they may be permitted to stand even under the Act of 1817. This point at any rate is not in the case.

[11.] The only other ground of alleged error is, that a set of interrogatories were tendered and read as Livingston's, whereas they were the depositions of Robertson. Why did not plaintiff's counsel examine them when offered to him? It is conceded that this was a mere mistake, noticed by neither party, until after the trial; and nobody was hurt by the misnomer. There is nothing in the objection.

Judgment reversed.

SAMUEL T. JONES, plaintiff in error, vs. HILL & COOK, defendants in error.

In case against livery stable keepers, for carelessly tying a horse, whereby he choked himself to death, a witness swore, that he told "the negro boy in attendance at the stables," not to tie the horse. The witness and the plaintiff were horse drovers, driving their horses in company. At the time when these words were spoken to the negro, it did not appear where the owners of the stables were.

Held, That the words were admissible in evidence, for the plaintiff.

Action on the case, from Dougherty county. Tried before Judge ALLEN, May Term, 1858.

Jones, the plaintiff, in company with another, put his stock of horses up at the stables of defendant, in Albany. Next morning one of the horses was found dead, with a halter around his neck, being choked to death; and Jones brought this suit to recover the value of the horse.

On the trial, the interrogatories of Charles Conley were read, proving that defendants kept stables at Albany, and plaintiff put up his horses with them; witness told the negro boy in attendance at the stables, not to tie the horse, the subject of this suit; if he did, the horse would be liable to hurt himself, but to tie a rope behind him; but the negro tied a rope around his neck, and the horse was choked dead the next morning; does not know the rules of the stable, or that the horse was given into the keeping of the proprietors particularly, or that they were present when he said the foregoing to the negro, or that the plaintiff gave any instructions about the horse himself.

The value of the horse, &c., was proved.

On motion of defendant, the Court ruled out what the witness testified he said to the negro; and also, on motion of defendant's counsel, awarded a nonsuit, and plaintiff by his counsel, then and there excepted to said rulings of the Court, and assigned error.

MORGAN, for plaintiff in error.

STROZIER & SLAUGHTER, for defendants in error.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in excluding what the witness, Conley, told the negro?

What was thus excluded, was certainly pertinent on the question of diligence. It was, therefore, admissible, if it was legal.

Counsel for the defendants say, that it was not legal; they say, that Conley had no authority from Jones, the plaintiff, to tell any body any thing; and that if he had any authority, to give instructions about the horse, a negro was not the person to give them to, when the master was present.

But as to the first of these positions,—is it true, that Conley had not this authority from Jones? He and Jones were "drovers," traveling together selling horses, and, no doubt, each was assisting the other in attending to his horses. If so, each was agent for the other in a matter relating to stabling the horses.

And then, is it too much to presume, that, as the two were traveling in company, Jones was actually present when the directions were given by Conley to the negro?

And, supposing it true, that Conley did not have this authority from Jones, yet was *authority* necessary? Was it not enough, that the livery-stable keepers had *information*, come from what source it might, as to the danger of tying the horse? Having such information, they would have an opportunity to protect themselves from the unusual risk,—they would have the chance to say, we will not receive such a horse. Receiving the horse, therefore, was impliedly undertaking to bestow on him, the degree and kind of care which, according to their information, his qualities demanded.

We think, that this first position is not tenable.

As to the second position. The counsel for the defendant admits, that if, when the directions were given to the negro, the stables were in the care of the negro, and the masters were absent, the negro was a proper person to receive the directions. And this is no doubt true.

It appears, that when the directions were given to the negro, he was "in attendance at the stables," it does not appear whether the owners of the stables were then present at the stables or not, it does not appear, where they then were.

Now it must be true that they were either present, or absent, at that time. But if they were present, it is to be presumed, that they themselves heard the directions; and if they were absent, it was sufficient that the negro heard them. Either way, therefore, the directions were sufficient, so far as it concerned the person to whom they were given.

We think, therefore, that the Court below erred, in excluding what the witness, Conley, told the negro; and, therefore, that the case ought to be reinstated.

It becomes needless, to say any thing further about the nonsuit.

Judgment reversed.

THOMAS. B. ELFE and THE MACON BUILDING AND LOAN ASSOCIATION, plaintiffs in error, vs. JANE COLE, defendant in error.

[1.] The one year's support allowed by the Acts of 1838 and 1850, to the family of a testator or intestate, out of the effects of the estate, is paramount to the lien of a mortgage given by the deceased in his lifetime.

[2.] The doctrine of mortgages considered, and the previous decisions of this Court upon this subject, reviewed and affirmed.

The deed of mortgage conveyed the legal title into the mortgagee.—BENNING J.

Equity, from Bibb county. Tried before Judge LAMAR, May Term, 1858.

Jane Cole, for herself, and as next friend of her three children, filed her bill for specific performance and injunction, alleging that her husband, Henry H. Cole, died possessed of a house and lot in the city of Macon; and that Thomas B. Elfe took out letters of administration on his estate, and possessed himself of it. On application, commissioners were appointed by the Ordinary, to set apart to complainant and her children, a support for the year next succeeding her husband's death. With notice to defendants, who were present, assisted by counsel, the commissioners set apart the said house and lot for the year's support, valuing the support at $650, and the lot and improvements at $750, and required complainant to pay to the association $100, it being represented by Elfe, that said Macon Building and Loan Association had a mortgage lien on said premises, for the full value thereof, and that these said premises be exempt from levy and sale under any judgment against said deceased; and to pay to Elfe $35 70 for an advance made the estate; complainant paid Elfe the money and took his receipt therefor; tendered the money to the association, which they refused to receive. After complying with the award of commissioners, she demanded the house and lot of Elfe, and he refused to deliver it, on the ground that he would be liable to the association for the rents, which she sought to avoid, by offering to indemnify him against the loss; Elfe was a stockholder in the association; that the association was proceeding to foreclose its mortgage, and after judgment would collude with Elfe, and endeavor to defeat complainant's rights to the premises. The bill prayed a perpetual injunction against said association, to restrain them after judgment, from selling said property; and that said association be made a party defendant to the bill, and claims double rent from Elfe, who held the premises wrongfully after demand, when the title had vested in complainant and her children by virtue of the award of the commissioners, and prays to be delivered possession of the premises, and a perpetual injunction also, restraining Elfe from selling the premises, &c.

The answers were responsive, and they went to trial, agreeing that the association should have all its rights, as though it had filed a cross bill. The material facts were admitted by the answers.

The verdict was for plaintiff, and defendants moved for a new trial on the following grounds:

Because the verdict of the jury was contrary to law and the evidence, and against the equity of said case.

Because the verdict is against law, and strongly against the weight of evidence.

Because the Court erred in charging the jury that, according to the case made by the answers of defendants, the claim of complainants, under the award of the commissioners, took precedence of any and all claims and liens set up by the answers of defendants, in behalf of said Macon Building and Loan Association, and that therefore, the jury ought to find a verdict for complainants, decreeing a specific performance of the said return, under which complainants claim, and setting apart said land to complainants, free from any and all claims and liens in behalf of said loan association, set up in said answer.

Because the Court erred in charging the jury that, according to the case made by the evidence, they must find for the complainant a verdict, decreeing against defendant a specific performance of the return of the persons appointed by the Ordinary to set apart for complainant, a year's support out of the estate of Henry H. Cole, deceased.

Because the Court erred in charging the jury that, according to the case made, complainants were entitled to recover of defendant, Elfe, rent for the premises in dispute, from the time when said return was made.

Because the Court erred in charging the jury, that the complainant was entitled to recover the amount of rent which the premises were proven to have been worth, without regard to what Elfe may have received. Which motion the Court refused, and defendant's counsel excepted.

LANIER & ANDERSON, for plaintiffs in error.

STUBBS & HILL, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

When this case was up before, (23 *Ga. Rep.* 235,) we held, that the one year's support allowed the family of testator or intestate, out of the estate of the deceased, was paramount to the mortgage lien of the loan association, or any other debt due, or obligation, which the decedent could contract. Such is the express language of the law. *Cobb*, 296, 298. And in this opinion all the Judges concurred. We do not see that the present case differs from that. It is true that it is alleged that it was cotemporaneously agreed between all the parties, that concurrently with the execution of the deed from Elfe to Cole, that Cole should substitute his mortgage to the loan association, in lieu of Elfe's, which has been done. And the attempt is made to analogize this case to that of *Scott, Carhart & Co., against Warren & Spicer*, (21 *Ga. Rep.* 408,) in which it was held, that where A. takes a conveyance in fee, and at the same time, under an agreement to that effect, mortgages the land back to the grantor, that the transitory seizin of A. for an instant, when the same act that give him the estate conveyed it out of him, did not so vest the title in A., as to subject the land to an existing judgment lien, to the exclusion of the mortgage lien.

But the analogy between the two cases fails entirely in this. In *Carhart's case*, the vendor and mortgagee were the same persons. The title to the land was in the mortgagee originally. Before the transfers it was his property. But this lot never belonged to the loan association, but was bought by Elfe, of Freeman & Robert, and by Freeman conveyed to Cole. Elfe might have stipulated for his own indemnity, to retain the title in himself, till the substitution of mortgage was made. And for that purpose his agreement would have been enforced. But that has been done. There is no complaint on that score. Cole executed a mortgage in pursuance of his undertaking with Elfe, with which the loan association were satisfied, and thereupon, released the mortgage previously executed by Elfe to them.

This is, then, the identical question decided by this Court already, in this case. Had Elfe died without selling this lot, his family would have been entitled to the year's support, as against the loan association. And having conveyed to Cole, and Cole dying, the family of Cole, under the facts of the case, occupy precisely the same situation that Elfe's would have done.

Conceding all this, my brother Benning now thinks the other decision made in this case was wrong, and that we ought to retrace our steps. His view, if I rightly understand it, is briefly this: That while it may be true, that a mortgage is a security for a debt, yet to constitute it such, the title is conveyed to the mortgagee. And that, consequently, upon the death of the mortgagor, the property mortgaged is not a part of his estate, except the equity of redemption. And that our foreclosure Act of 1799, has made no change in the common law, as to the rights of the mortgagor and mortgagee. That this being so, upon the death of Cole, he had only an estate in the equity of redemption, and that this only could be taken into the account, in making an allowance for his family. And thus, if one dies with his property encumbered with a mortgage or mortgages, for more than it is worth, that he leaves no estate out of which any provision can be made for his family.

I hold the contrary of this proposition to be law in this State; and I proceed to state the grounds of my opinion.

This question first came before this Court in 1846, the year after its organization, in the case of *Davis et al. against Anderson and others*, (1 *Kelly*, 176,) and was discussed with great ability, as the arguments of the learned counsel, in the reports, will establish. When it was solemnly decided, Judge Warner delivering the opinion of the Court, that "a mortgage in this State is nothing more than a security for the payment of the debt; and that the title to the mortgaged property remains in the mortgagor, until foreclosure and sale, in a manner pointed out by the statute."

I beg leave to add, that that judgment ought never to have been called in question again. It settled a great question, upon which vast consequences depended. It was no innovation upon past adjudications, but in accordance with the practice of the Courts for near a half century. It should have remained undisturbed.

It seems, however, that the same question came up again in *Winter vs. Garrard*, (7 *Ga. Rep.* 183,) when the same eminent Judge who pronounced the former opinion, was again the organ of the Court. Judge Warner said: "In this State, as we have already held, a mortgage is only a security for the payment of the debt of the mortgagor. The foreclosure of a mortgage, in this State, does not vest the fee in the mortgagee; it only authorizes a sale of the property, and directs the surplus, after discharging the debt, to be paid to the mortgagor or his agent."

Again, in 10 *Ga. Rep.* 65, in the case of *Ragland vs. The Justices, &c.*, we say: "With us, this is not an open question." Shall the day ever come when this can be affirmed of any principle in Georgia? It would seem not.

In *Scott, Carhart & Co. vs. Warren & Spicer*, already referred to, my brother McDonald, one of the few remaining types of the old school lawyer, as well as gentleman, thus discourses upon this doctrine: "At the time of the execution of the mortgage, then, the estate did not pass absolutely out of the mortgagor, and of course did not vest absolutely in the mortgagee. In England, and in some of the States of the Union, when the condition is broken, the estate is so absolutely vested in the mortgagee, that he may maintain ejectment and recover the premises. This is not the case here. In this State a mortgage, in its inception, is nothing more than a security for the payment of money; and it so continues to be, and nothing more after the breach of the condition. The mortgage, therefore, creates a lien only, and not an estate; and the mortgagee, in relation to the mortgaged property, stands on the same footing of any other creditor. He is entitled to be paid according to the date of his lien. His lien takes effect from the date of his mortgage; that of the judgment creditor from the date of his judgment."

Thus stands the case then upon authority.

But apart from this current of decision from our own Court, let us scrutinize for a moment, the grounds upon which these decisions rest. And startling as the enquiry may appear, I ask, even in England, in whom is the legal seizin of land, the mortgagor or the mortgagee? This seizin, if in the mortgagor, before the mortgage is executed, must remain in him, or be transferred to the mortgagee. Is it in the mortgagee? It will be found upon examination that, even in Britain, this doctrine has undergone a great change, notwithstanding the explicit terms in which it is usually found laid down in elementary writers, and the *dicta* of Courts. At first, mortgages were feoffments, or conveyances of land, from debtor to creditor, with condition that if the money was not paid at the day appointed, the lands became absolutely vested in the creditor, freed from the condition. *Lit. sec.* 332. Even a subsequent tender of the money did not avail the debtor. He lost the land, no matter how high the value, or how small the sum it was designed to secure. 5 *Reports*, 95, 114.

This was too oppressive to be borne, and both, Courts of Law as well as Equity, united to establish a different doctrine. And since the reign of James I., the right of redemption has been so fixed, that the mortgagee could not defeat it, even by incorporating in the mortgage, an agreement to that effect. 1 *Vernon*, 33, 138, 190, 488; 2 *Vernon*, 520. Since that time, the mortgagee has had no certain or absolute estate in the land, until after foreclosure; and that is the creation of a new title, and not the confirmation of an old one. 1 *Atkins*. 603. Even if he recovers the possession by entry, or by suit, he holds not for himself by *title;* he must render a strict account of the profits; and his possession may be at any moment at the will of the mortgagor terminated. 1 *Vernon*, 45, 476; 2 *Atk.* 534. He cannot use it as his own. He will not be permitted to do waste. *Cro. Jac.* 172; 3 *Atkin.* 728. He cannot sell or lease so as to bind the mortgagor. 9 *Mod.* 1. His estate is not considered as real, but personal. 2 *Vernon*, 401. It is a mere security, a mere charge on the land. 2 *Burrows*, 969.

A mortgagee is not considered a freeholder for any purpose whatever. His property is personal assets. If he devise it, it will not pass by the words land or real estate. It is not subject to curtesy or dower, the necessary attendants upon legal estates in land. A transfer of the debt puts an end to it. 2 *Bur.* 969. It has not one characteristic of a legal estate. It is a mere security for money, and a power to gain possession of the land in order to make it. *Reeves D. R.* 53.

I repeat, is the seizin in the mortgagee? Because it was so of old, when all the consequences followed, shall it be still so held, when none of the legal incidents attach, even in England? To hold so, is to disregard reason and every sensible distinction.

If the seizin be not in the mortgagee, it must be somewhere —it is clearly in the mortgagor. It must be in one of them. There is not one quality of a legal estate that does not attach to the mortgagor. It is never treated as personalty. It is not so in settlements by executors and administrators, or in sales by Sheriff, under executions. It is always, and every where, located as real estate in the hands of the mortgagor. It will descend to his heirs. If devised, it requires a will having the requisites of realty. The mortgagor, by the law of England, is entitled to every benefit, and must bear every burden appertaining to freeholders.

I concede, that in England, the mortgagee, by entry or ejectment, may obtain the possession; but that is only for a special purpose; and even when the possession is taken from the mortgagor, his title is not altered any more than it is when the tenant of a term gets possession from the landlord or tenant in fee. The mortgagor is still the owner. He is entitled to have all the profits, to the last cent, applied to the payment of the mortgage debt. And at any moment he may recover possession by the payment of the money, with or without the consent of the mortgagee. Is he not the owner?

But I forbear to enlarge upon this branch of the argument. If these positions be sound, the pretense set up here for excluding the family of Cole from any allowance out of this property because, under the mortgage, the title or legal estate is in the loan association, is wholly without foundation. And moreover, they go to maintain, upon a basis not to be shaken, the adjudications of this and the Circuit Courts; to the effect, that the interest of the mortgagee is a mere incumbrance or security, and that the legal estate remains in the mortgagor, until after judgment of foreclosure and judicial sale under it. Did the right of the family of Cole depend entirely upon the common law, independent of any aid from our own legislation, I should be prepared to adjudge in their favor. But I cannot avoid the impression, that the claim does derive much support from our own statutes.

While we have attempted to show, that even if our foreclosure Act did not take away the mortgagee's right to get possession of the land, after condition broken, by suit or entry, that that would not at all affect the point at issue in this discussion, still is it not a significant fact, that no practice or effort of this sort has been known in Georgia since 1799? Has any lawyer ever known an ejectment brought by the mortgagee against the mortgagor? The assertion of such a right, after a suspension of sixty years, would be preposterous. Why should this remedy be resorted to when the process of foreclosure is so much better? Is it strange that it should have been discontinued?

Further, the law in sundry places, in treating of mortgages, speaks of them, not as transfers of the title to property, but as *liens.* *Cobb,* 172, 173, *and elsewhere.* In the distribution of money, a mortgage is considered as a lien, and takes its place according to its priority.

Mortgaged lands are treated by executors and administrators just as the other real estate of the testator or intestate, and mortgage debts are classified by the statute with the other claims against the estate, and the order of payment specified.

The Act of 1799 (*Cobb,* 288,) declares, that "when any guardian, executor or administrator, chargeable with the estate of any deceased person, to him, her or them committed, shall die so chargeable, his, her or their executors or administrators shall be compellable to pay out of his, her or their estate, so much as shall appear to be due to the estate of such orphan or deceased person, *before any other debt of such testator or intestate.*"

We have decided that under this Act, the orphan was entitled to be paid, to the exclusion of the mortgage creditor. (10 *Ga. Rep.* 65.) If this decision be right, and it has been acquiesced in so far as we know, can there be any doubt that the maintenance provided for widows and children shall be reserved "*notwithstanding any debts, dues or obligations which the testator or intestate might owe?*" (*Acts of* 1838 *and* 1850.)

It is suggested that the doctrine we contend works a great practical evil, and that this case illustrates it because the money of the association went to pay for this lot. Suppose it did? Would not even a vendor's lien have to yield to a claim like this? Why should the debt of the loan association be put upon a better footing than the vendor's lien? It is less favorable. The company never owned nor parted with this property. They simply advanced the money to pay for it *at a most remunerating premium to them, and ruinous to the borrower.* Every creditor is supposed to have advanced in money or property a consideration to his debtor. Why the preference set up in behalf of this particular? To this particular class of indebtedness? Even a trust debt, the most sacred known to the law, and which overrides a mortgage, must yield to this paramount claim of the family. In short, our opponents would have the Acts of 1838 and 1850 to read—every "debt due or obligation" shall be postponed to the year's provision for the family of a deceased husband and father, save and except a debt due the loan association for money bought and secured by mortgage!

To accord to the family nothing but the equity of redemption, amounts to nothing, of course, in cases of insolvency, and yet the law intervenes and rescues even this portion of an insolvent's estate, and appropriates it to the widow and children.

But I am done. A friendly writer admonishes me that I weaken my opinions by making them too long. I will endeavor to profit by the criticism.

It is insisted that no more rent can be recovered of Elfe than was received by him in this case, unless it could be shown that he was guilty of fraud, or gross negligence. The charge of the Court was, that he was liable for what the property was proven to have been worth. This ground would not make it necessary to send this case back, and we are not inclined to require the verdict to be sealed. Mr. Elfe was a member of this loan association as well as the administrator of Cole. His position is somewhat antagonistic. After the property was demanded, he no longer acted as the agent of the family, but held adversely to them. And we do not think it hard that he should be made chargable with what he could have got for the rent of the lot.

It is insisted, in the last place, that the verdict is against the weight of evidence, because proof of what the property actually brought, it is argued, is entitled to more credit than the speculative belief of two witnesses as to what it ought to bring. We are not aware of any rule of evidence to this effect.

What one rents land or hires negroes for, is one thing. What he might have obtained is quite another, and different thing. The latter, we believe, is the usual mode of charging delinquent trustees. This lot has been wrongfully withheld from this family; and the conduct of the defendant stands condemned by the judgment of the law in thus acting.

Judgment affirmed.

McDonald J. concurring.

Henry H. Cole, deceased, in his life time, purchased of the plaintiff in error half of lot No. 7 in square 77 in Macon, containing one-fourth of an acre, and received a deed conveying the same to him on the eleventh day of December, 1854. At the time of the purchase the lot was under mortgage to the Macon Building and Loan Association, for money borrowed from the association by the plaintiff in error. Cole agreed that on receiving the title, as a part of the consideration of purchase, to substitute his mortgage on the same property for that of plaintiff in error to the association. On the day after he received the above deed of conveyance, he executed a mortgage thereon to the said association, agreeably to his contract, and he became a debtor thereby to that amount to the association. After these things were fully arranged and the plaintiff in error had been released by the Macon Building and Loan Association, Cole died, and his widow applied to the Ordinary for a years' support and maintenance for herself and children. The Ordinary appointed five appraisers under the Act of 1856, to assess the sum necessary for their support and maintenance for twelve months. They assessed the sum of $650, and finding that there was no property belonging to the estate except the lot and two shares in the association, and furniture of little value, they set apart to her and the children the lot and improvements, on her paying to the mortgagee the difference between their unencumbered value and the same assessed.

It is not pretended that the assessment is unreasonable or excessive. In fact, there was no controversy upon that point. But it is insisted, that by the contract between Elfe and Cole, the legal estate to the lot never so vested in the latter as to entitle his widow to an allowance out of it under the application made by her; that as soon as the title vested in him it passed out of him, in equity, by virtue of the contract, although the mortgage was not executed, in fact, until the day after the conveyance to him by Elfe: and in support of the position the case of *Scott, Carhart & Co. vs. Warren & Spicer*, 21 *Ga. Rep.* 408 and other cases, are referred to. It is further insisted that, independent of the special agreement Cole made with Elfe, he was bound to extinguish the lien which existed on the property at the time of the purchase, before he could acquire such a property in the lot as would admit of support and maintenance to be allowed to the widow out of it.

When Elfe purchased the property from Freeman & Roberts, the title passed from them. There was no lien held by them on the property for the purchase money, and they must have executed to him a conveyance before he could mortgage it to the association. This mortgage was to secure the payment of borrowed money. When he sold the lot to Cole, it was a matter of agreement that Cole should mortgage the property to the association, and, in that manner, obtain his release from that liability. He conveyed to Cole. The title was thus vested in him. According to his contract he executed a mortgage to the association, and Elfe was released. What did this arrangement accomplish? Cole became the debtor to the association in the place of Elfe, but he was no purchaser from the association. In regard to the widow's and childrens' rights, the association substituted the possible claim of Cole's widow and children for that of Elfe's widow and children. It substituted the risk of Elfe's life for that of Cole, and also of the amount of the allowance to which the wife and children of one or other of these mortgagors would be entitled on his death. If the property had remained with Elfe, and he had died, it might have taken all for the twelve month's support and maintenance of his wife and children. The right of the widow and children is superior to the debts, dues or obligations of the deceased. *Cobb 296.*

It is true, as contended for by counsel for the plaintiff in error, that either Cole or Elfe was obliged to extinguish the lien on the property before Cole could get a good title. He did extinguish it, but gave another. He converted Elfe's debt into his own, and substituted his lien for Elfe's. If the lien had remained, binding the property for Elfe's debt, the enforcement of it would have defeated any title derived from Elfe of junior date to the lien, and with the title, all rights depending on it must have failed also.

It follows that, if the award of the appraisers vested the title in the widow and children upon the payment of the money, and the money was tendered and refused, the complainants are entitled to a decree for the rent upon the payment of the money awarded to the association. The jury have decreed the payment of the money by the complainants, and have decreed to them the rents. The verdict is for a sum proven by two witnesses. I am of opinion that the judgment of the Court below ought to be affirmed.

Benning J. dissenting.

Cole mortgaged the lot of land, to the loan association, to to secure a debt nearly of the value of the land, and, without having paid the mortgage, died, leaving his interest in the land, as about his whole property.

Were his widow and children entitled to a year's support out of the land in preference to the rights of the mortgagee? If they were not, it is manifest that the Court below erred in refusing a new trial. I think, that they were not; and why I think so, I will now proceed to state.

There are two statutes on the subject to which, the question refers, one passed in 1838, the other in 1850. The former declares; "that when any person shall die, leaving a widow and children, or a widow, or child, it shall and may be lawful for the executor or administrator thereof, to allow out of the effects of such deceased person, a reasonable support and maintenance for the space of twelve months, next ensuing, immediately after the death of such testator, or intestate, notwithstanding any debts, dues, or obligations, of said testator or intestate." *Cobb* 296.

The statute of 1850, substitutes the word, "estate," for the word, "effects;" in other respects, it is like the statute of 1838, except, that it provides for the case in which, there is no "administration." *Id.* 298.

I take the legislative intention to have been, that the two words were to have the same meaning, and, that, a meaning which the word, "estate," as being the larger one, better expresses. I shall, therefore, use that word, when I have occasion to use either.

The allowance, then, was to be out of the "*estate*" of Cole.

The question, therefore, is, what was his *estate* in this lot of land?

His estate in the lot, was either the whole interest in it, or only the equity of redemption in it; the whole interest, if the mortgage deed conveyed no interest out of him, into the mortgagee; only the equity of redemption, if the deed conveyed the legal title out of him, into the mortgagee.

Now, I say, that the deed conveyed the legal title out of him, into the mortgagee.

That the deed should do so, was certainly *the intention* of the parties to it. The words they use, are the very words which the law itself has selected, as the best and aptest of any, for expressing such an intention; are, indeed, the very words which do express the intention to convey the legal title, when they are used in any other sort of a deed. The mortgagor "gives," "grants," "bargains," "sells," the land, to the mortgagee.

I say, then, that the *intention* of the parties was, that the deed should convey the legal title, into the mortgagee.

The intention of the parties to a contract, is to govern, if there is not something making the intention illegal.

Is there anything making this intention of the parties illegal? Nothing, certainly, in the *common law*. On the contrary, there is in the common law, a rule which specially adopts and enforces this very sort of intention; a rule which specially says, that the deed of mortgage conveys the legal title into the mortgagee.

Is there any *statute* making this intention, illegal, and so repealing this rule of the common law?

That there is none doing it *expressly*, is certain; and that this fact is so, is of itself, almost, sufficient to require us to say, that there is none doing it impliedly; for it must be most improbable, that the Legislature, if intending to repeal so important a rule, would adopt the indirect mode of repeal by implication, in preference to the direct mode by expression.

Is there, then, any statute which, by *implication*, repeals this rule? any statute repugnant to it? any statute saying, that the deed of mortgage, shall not convey the legal title into the mortgagee?

In *Davis vs. Anderson*, (1 *Kelley* 193,) it is said, that "A mortgage in this State, is nothing more than a *security* for the payment of the debt; and the title to the mortgaged property remains in the mortgagor, until foreclosure and sale in the manner pointed out by statute." This would seem to say, that a mortgage being in this State, but a mere security for the debt, is owing to some law peculiar to this State: and, that any law making a mortgage but a mere security for the debt, makes it such a thing, that it cannot convey the legal title, into the mortgagee.

If these two propositions are true, I admit, that there must be some law of Georgia, which, by implication, repeals the common law rule. Are they true, then?

First as to the first: I say, that by the common law itself, (considering equity as a part of it,) a mortgage is nothing else than a security for a debt, and has been nothing else, for ages.

"They" (courts of equity,) "soon arrived at the just conclusion, that mortgages ought to be treated, as the Roman law had treated them, as a mere security for the debts due to the mortgagee." 2 *Story Eq. Sec.* 1013; see *Section* 1016.

"So in mortgages being only a lender, as the other," (a bond,) is a personal security for the money lent," &c. 3 *Black* 433.

"Equity having determined that the mortgaged debt shall be considered the principal, and the land a pledge," &c. *Coote on Mortgages* 492

"On this principal rests the doctrine of foreclosure, which we are about to consider, and in the application of which, the forbearance of equity on behalf of the mortgagor, seems to be carried to its utmost limits, even so far as, in some instances, to work a serious detriment to the mortgagee; for equity is ready to receive the excuses of the mortgagor not only for the purpose of giving him time to procure the money previously to the foreclosure, but also for the purpose of opening the foreclosure, even after many years quiet possession by the mortgagee, under an absolute decree of foreclosure, confirmed, signed, and enrolled." *Ibid.*

"In one case, the foreclosure was opened after sixteen years." *Id.* 496. See, *Burgh vs. Langdon*, 15; *Viner*, 476; 2 *Eq. Ca. Ab.* 609; *do.* 605; *Cocker vs. Bevis*, 1 *Ch. Ca.* 61.; *Ismood vs. Claypool*, 1 *Ch. Rep.* 139; *Ford vs. Wastell*, 6 *Hare*, 229; 2 *Phul.* 591; *Edwards vs. Cunliffe*, 1 *Madd.* 287; ("in which the period for payment was enlarged the fourth time.") *Eyre vs. Hanson* 2 *Beav.* 478; *Geldard vs. Hornby*, 1 *Hare*, 251; *Jones vs. Creswick*, 9 *Sem.* 304; *Ellis vs. Grif-

fith, 7 *Beav.* 83; *Alden vs. Foster*, 5 *Beav.* 592; *Garlick vs. Jackson*, 4 *Beav.* 154; all cited in the same work.

It is true then, that by the common law itself, a mortgage is nothing but a security for the debt. It, therefore, did not require any law peculiar to this State, to make a mortgage, but a security for the debt. The common law, which this State shared with England, and its sister States, was quite sufficient to do that.

The first of the two propositions, then, is not true. I pass to the second.

Is it true, that any law which makes a mortgage to be, but a security for the debt, makes the mortgage such a thing, that it cannot convey the legal title of the mortgaged property, into the mortgagee? In other words, can it not be, that a mortgage may be only a security for the debt, and yet, convey the legal title into the mortgagee?

By the common law, as we have seen, a mortgage is but a security for the debt, and yet by that law the mortgage conveys the legal title into the mortgagee. This all admit; and this, of itself, is conclusive. But I go on.

Whatever gives the creditor, the legal title to his debtor's property, gives him the very best means of applying that property, to the payment of his debt. To say, therefore, that the mortgage gives the mortgagee, the legal title to the mortgaged property, is, to say, not, what will prevent the mortgage from being a security for the debt, but, what will render it a better security for the debt.

The pawnee has the legal title to the pawn; the vendor of land who gives only his bond for titles, has the legal title to the land; the trustee in a deed of trust, with a power to sell, and pay himself his debt, has the legal title to the trust property; the assignee in a deed of assignment to secure creditors, has the legal title to the assigned property; yet, in all of these cases, there is nothing but a security for the debt.

Or, is it to be said, that in these cases, also, the legal title is not in the pawnee, and the other creditors, respectively? There is the same reason that this should be said in these cases. But nobody has as yet gone that length.

It may well be, then, that a mortgage may be only a security for the debt, and yet, may convey the legal title into the mortgagee. It, follows, that the second of the two propositions, cannot be true.

The two propositions seem to be the foundation on which *Davis vs. Anderson*, (1 *Kelley*) rests.

Thus far, then, we find nothing to repeal the common law rule, that the mortgage conveys the legal title into the mortgagee.

Is there any thing else, as to which, it might be argued, that it repeals this rule? One thing else, I have heard mentioned, is, the foreclosure law contained in the Judiciary Act of 1799. That law, in defining "the method of foreclosing mortgages on real estate," says after providing for a rule nisi, that "unless the principal, interest and costs be so paid, the Court shall give judgment for the amount which may be due on such mortgage, and order the property mortgaged to be sold in such manner as is prescribed in cases of execution, and the money shall be paid to the mortgagee or his attorney; but where there shall be any surplus, the same shall be paid over to the mortgagor or his agent." *Cobb* 1137. This is saying, that on foreclosure, the property, instead of becoming *absolutely* the mortgagee's is to be sold by the Sheriff, and the money arising from the sale of it, or so much as may be needed, is to be applied to the payment of the debt. But is that saying what repeals the common law rule which puts the legal title, into the mortgagee? Is that saying what is repugnant to the common law rule? May it not be, that this sale by the Sheriff, &c., may take place, and yet the legal title be in the mortgagee? Most assuredly. The vendor of land who merely gives his bond for titles, retains the legal title in himself, and, to secure the purchase money. Yet he may have a decree in equity, for the sale of the land

and the application of the money arising from the sale, to the payment of the purchase money; and this decree is a thing that has to be executed by the Sheriff. The same is true of the pawn-broker and his pawn. The same is true, in many of the cases of assignments, to secure creditors, and, in many of the cases of other deeds of trust, to secure the payment of money.

Nay, in many cases of mortgages themselves; those mortgages which, beyond question, put the legal title into the mortgagee, this same thing has always been true, by the common law. A rule that the mortgaged property shall be sold under judicial process, and the proceeds of the sale be applied to the payment of the mortgage debt, is no new rule.

In all cases in Ireland and in many cases in England, this has always been the rule.

" In Ireland, it is the practice, instead of a foreclosure, to pray that the estate may be sold, and the moneys applied in satisfaction of the encumbrances, and " the surplus paid to the mortgagor." *Coole Mort.* 493.

Yet did ever any body hear the idea advanced, that in Ireland, the mortgagee does not have the legal title.

" In certain instances, also in England, a decree for a sale instead of foreclosure, may be obtained; as, if the mortgage be of a dry reversion, or if the heir of the mortgagor be an infant." " It also seems, that if the bill for foreclosure be taken *pro confesso*, the Court will order a sale; and if one of the executors of the mortgagee be himself the mortgagor, the bill by the executors, shall be for a sale. If the mortgagor die, and the heir and executor be the same person, who by his answer admits the personal estate deficient for payment of debts, a sale may be obtained in the first instance without a reference for an account of the personal estate. Lord Hardwick seems to have thought, if the security was scanty, a sale might be decreed." *Id.* 493, 494.

" Mr. Fanblanque" observes, " the safer course is, for the mortgagee to pray a sale; but note, he cannot pray a sale, without previously praying a foreclosure." *Id.* 495.

Many cases are cited for these positions; 13 *Ves.* 205; *How vs. Vigures*, 1 *Ch. Rep.* 18,; 16 *Viner*, 476; *Booth vs. Rich*, 1 *Vern.*, 295; *Scholfield vs. Heafield*, 7 *Sim.*, 669; *Mondey vs. Mondey*, 1 *V. and B.* 293; *Davies vs. Dounding*, 2 *Keen.*, 245; *Foster vs. Eddy*, 18 *L. J.*, *Ch.* 151 *N. S.*; *Dashmoode vs. Bithazey*, *Moseley*, 196; *Lucas vs. Seale*, 2 *Atk.* 56; *Daniel vs. Skipwith*, 2 *B. C. C.* 158; *Earl of Kennoul vs. Money*, 3 *Swans*, 208, *n.*; *Powell on Mortgage*, 1015.

Now, would it not astonish an English lawyer to be told, that the legal title, in all of these cases, was not in the mortgagee.

But, if, in these cases, various and numerous as they are, there is no repugnancy between the law which provides for a sale of the mortgaged property, and the law which causes the legal title to pass into the mortgagee, it cannot be, that there will be any repugnancy between the two laws, in any case.

Hence, I say, that the foreclosure law, aforesaid, in the Act of 1799, is not repugnant to the common law rule, which clothes the mortgagee with the legal title. Indeed, this very provision itself, speaks of "*foreclosing*," "*foreclosure*,"—words implying the existence of the legal title in the mortgagee.

But at least, I may say, that there is no *necessary* repugnancy, between this foreclosure rule in the Act of 1799, and the common law rule which puts the legal title into the mortgagee; and if I may, that is enough; for the repeal by implication never takes place, except in the case in which the repugnancy between the two laws is *necessary*. Especially is this true, if a repeal would be followed by important changes. And a repeal if it took place here, would be followed by very important changes; changes greatly to the disadvantage of the mortgagee, as a security. Let us see.

The mortgagee with the legal title in him, is the *owner* of the property. Therefore he can defy liens and claims that are merely against the *mortgagor* or *his* property, if they are of younger date than the mortgage. And what a number and variety of these liens or claims there may be. The mortgagor's widow's right of dower, is a claim against *his* estate; the right to a year's provision, which the mortgagor's widow and children are entitled to, in preference to any other lien, &c., (the right in question in the present case,) is a right against *his* "estate;" the lien of carpenters, masons, &c., for work which they have done for the mortgagor, is a lien against *his* property; the claims of orphans against a mortgagor, as guardian, or as executor, or as administrator, which claims he leaves unpaid, at his death, are claims against *his* estate. Here are some of these liens and claims. These being all against the property of the *mortgagor*, the mortgagee, with the legal title in him, may safely defy them, if they are younger than his mortgage. Because, in that case, they are not even against the interest which *he* has, in the property, but only against whatever may remain of the property after his interest has been taken out of it; in a word, they are only against whatever is the *mortgagor's* interest in the property. Whereas, the mortgagee, with the legal title not in him, but in the mortgagor, has to succumb at once, to any of these liens and claims, no odds how young they may be, for the law gives them all a preference over his mortgage, if it is but a mere lien on the *mortgagor's* property.

Again; the rents go with the legal title. Therefore, if the legal title does not go into the mortgagee, he loses the security of the rents.

So, the covenants of warranty, and other covenants real, contained in the mortgage, become worthless, absurd.

Again, the terms, *alienation*, *conveyance*, *title*, and similar ones, are of constant recurrence in contracts, in statutes, and in other writings. With the legal title in the mortgagee, they include mortgages; not, with it not in him. What changes are shadowed forth here.

Finally, if we say, that a mortgage's being but a mere security for money, is reason enough to prevent the mortgage from taking the legal title out of the mortgagor, and putting it into the mortgagee. Then, we must say the like thing, in like cases.

A pawn is but a mere security for money; when a man sells land, giving a bond, for titles to be made on payment of the purchase-money, the bond is a security, for the money; the deed of trust, made by the borrower to the lender, with a power of sale to pay the lent money, is a mere security for money; the assignment to trustees for the benefit of creditors, is a mere security for money. These, then, are all like cases.

Therefore we ought to apply the principle to them, and say, that the legal title is not in the pawnbroker; not in the vender; not in the lender; not in the assignee; but, in, the pawnor; the vendee; the borrower; the insolvent assignor. Consistency requires us to go this length.

These then, are the changes, or some of them, to be wrought, by holding that the part of the Judiciary Act of 1799, relating to the foreclosure of mortgages, repeals the common law rule which puts the legal title into the mortgagee. Being so many, and so great as they are, I am sure I may say, that we ought not so to hold, unless obliged to do it; unless there is a *necessary* repugnancy between the rule and the Act.

Now, there is, between the two, no approach to repugnancy, I think; I feel sure, no *necessary* repugnancy.

It is not pretended, I believe, that there is any other Act that repeals the common law rule.

I come, then, to the conclusion, that the deed of mortgage, in this State, still conveys the legal title, into the mortgagee. This is a conclusion which I have been struggling against, for some time. I can struggle against it no longer. The question it concerns is no light one.

I dissent from the judgment of the Court.

Abner S. Mariner and Josiah Roberts, plaintiffs in error, vs. Zachariah Rodgers, defendant in error.

A bond stipulated, that the obligor was to deliver "*the possession*" of a lot of land to the obligee.

Held, That parol evidence was admissible, to show what was the estate that was to accompany the possession.

Debt, in Muscogee. Tried before Judge Worrill.

Zachariah Rodgers and Abner S. Mariner swapped lots and houses in the city of Columbus, and were to deliver possession each to the other at a certain time. Mariner and Josiah Roberts entered into bond with Rodgers, conditioned in a certain sum, for the faithful execution of the agreement on Mariner's part, if Rodgers should demand possession on the day, and offer possession. Rodgers did so, and Mariner refused to give possession; Rodgers sued on the bond.

On the trial plaintiff proved these facts, and that the rent of Mariner's lot was worth twice as much as that of Rodgers' lot.

The jury found for plaintiff, and the defendant moved the Court for a new trial, on the grounds:

1st. That the Court erred in admitting testimony as to the value of the rents of the two lots contracted to be exchanged.

2d. Because the Court erred in rejecting parol proof in explanation of the contract, that the contract was intended as a swap, and not as an exchange for a year or a term of years.

3d. Because the Court erred in charging the jury, that the difference in the value of the annual rents of the two lots was the criterion of damages under the contract, and that they might, if the evidence authorized it, find for the plaintiff such difference, from the breach of the contract up to the time of the trial.

4th. Because the contract is uncertain in its terms, and insufficient in law to authorize a recovery.

5th. Because said verdict is contrary to both law and the evidence.

Which motion the Court refused, and defendant excepted and assigns error.

Holt & Hutchins, for plaintiffs in error.

Ingram & Russell, for defendant in error.

By the Court.—Benning J. delivering the opinion.

The action was on the bond given by Mariner and Roberts to Rodgers.

The condition of the bond was as follows: "that if the said Mariner and his wife, Avarilla S. Mariner, shall, on the 28th day of December next, or thereafter on demand, deliver to said Rodgers, or his order, possession of the north half of the lot in the city of Columbus, in said county, known and distinguished in the plan of said city, as lot No. 137, with the present improvement thereon, provided, said Rodgers shall upon a similar demand, at the same time, deliver possession to said Mariner or wife, of that parcel of ground, lying in the said county, in the Coweta reserve, and known as the south-east quarter of the one hundred acre lot, No. 114, in said reserve, and containing twenty-five acres, then this bond to be void, else to remain in full force and virtue."

A breach of this condition, by Mariner, was alleged in the declaration.

This condition expresses a stipulation for an interchange of mere *possession*; it is silent as to what is to be the *estate* that is to accompany that possession.

Now possession is a thing that may be accompanied by any estate; as, by an estate at will; for years; for life; in fee.

Consequently, it will be entirely consistent with a right of possession, that the person entitled to the right, has an estate at will; or an estate for years; or an estate for life; or an estate in fee. At least, it will be quite as consistent with this right, that he has an estate for life or one in fee; as it will be that he has an estate but for years.

Thus, then, the bond only saying, that Rodgers was to have the possession,—being silent as to the quantity of estate he was to have with the possession, it would be consistent with the bond that he was to have any quantity of estate; quite as consistent with it, that he was to have the fee, as, that he was to have but a term of years.

The Court below admitted evidence offered to show, that the estate which it was intended should accompany the possession, was an estate only for years, but refused to admit evidence offered to show, that such estate was one in fee.

It follows, from what has been said, that the Court must have erred in refusing to admit the latter evidence or in admitting the former.

Judge Lumpkin and I, think that the Court erred in refusing to admit the latter. Judge McDonald thinks the Court erred in admitting the former.

The other grounds of the motion, depend on the ground first disposed of. Obviously, the measure of damages, depends on the quantity of interest which was to be interchanged with the possession.

New trial ordered.

JOHN QUIN, plaintiff in error, vs. BERNARD G. STERNE, defendant in error.

[1.] Where the signature of a party is put, at the time it was made, upon a promissory note, payable to another or bearer, and held by the payee continuously from the execution and delivery of the note, the location alone of the signature is not to control in settling the liability of the parties.

[2.] The signature of the maker of a note, is usually below, at the right hand; it is not essential, however, that it should be there; and it matters not in what part of the note it is placed, provided it can be ascertained who the maker is. And the same doctrine applies to indorsers.

[3.] There are but two original parties to promissory notes—makers and payees—and so long as the papers remain in the hands of the payee, the idea of an indorsement is excluded.

Debt, from Muscogee county. Tried before Judge WORRILL, May Term, 1858.

The facts of this case are fully set forth in the opinion of the Court.

WELLBORN, JOHNSON & SLOAN, for plaintiff in error.

L. T. DOWNING, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

On the 25th of March, 1857, Timothy Quin and S. B. Beaumont gave their note to B. G. Sterne or bearer, for $197 93, payable at the Agency of the Union Bank, at Columbus. On the back of this note John Quin wrote his name. The plaintiff, in his writ, charged all three of the parties with having made and delivered to him this note. That is, the declaration, in effect, alleges that all three signed the note before it was delivered to the payee. The declaration was demurred to on account of the misjoinder of parties; and after the note was read, the defendant moved to nonsuit the plaintiff. Both of his motions being overruled, the defendant, by his counsel, excepted.

[1.] It is immaterial upon what part of the note the name of the maker is written. The declaration avers that all the parties to this note signed it before it was delivered to the plaintiff. The demurrer to the declaration admits the fact, which is no doubt true; and the note as written sustains the declaration.

[2.] Whatever may be the legal interpretation of a note written payable to A. B. or order, the doctrine does not apply to a note like this payable to another or bearer. Suppose this note had been originally signed by Timothy Quin and S. B. Beaumont, and Sterne, the payee, had passed it by delivery, and it had been subsequently negotiated to John Quin, who endorsed it back to Sterne. In that event, he would be liable to Sterne upon his endorsement. So that he may be made chargeable as maker, under the case as it now stands, or even had he put his name upon the back of the note afterwards, he might be held liable to Sterne as indorser.

[3.] The note being payable to bearer, there is no ground to assume that the name of the payee was to precede the defendant's, as was argued in the case of *Collins & Everett*, 4 *Ga. Rep.* 266, was the construction of the instrument where the note was payable to order. *Story on Prom. Notes, sec's* 34, 152; *Chitty on Bills, Top. p.* 152; 16 *East.* 12; *Rex vs. Strain*, 1 *Stra.* 18; *Ross on Bills and Notes, Law Lib. vol.* 57, *Top. p.* 194; 2 *Burrows*, 669; 8 *Pick. Rep.* 122, 427; 24 *Ib.* 64; 4 *Cowen*, 400.

Judgment affirmed.

JANE BIVINS, plaintiff in error, vs. SAML. H. CRAWFORD, ex'or, defendant in error.

A testator bequeathes a life estate in his slaves to his widow, with directions to his executors, to remove them at her death to a free country. And further, that if funds cannot be raised from the sale of his other property, sufficient to cover the expenses of their transportation, that the negroes be hired out until money enough can be raised for that purpose.

Held, That the will is void, under our anti-manumission Acts. And further, that in order to legalize the will, it is not competent for the Court to strike out one of the provisions of the instrument.

This was a motion in Marion County Superior Court, on an appeal from the Court of Ordinary, to set aside the fifth and sixth items of Thomas Bivins' will. Argued and determined at chambers, by consent of counsel. Decision by Judge WORRILL.

Thomas Bivins died leaving a will, of which the following are the fith and sixth items:

"*Item fifth.* After the death of my wife Jane, it is my will and desire that my executor, hereinafter named, shall take all of my slaves and their increase, which are now or may hereafter be born, to some State or Territory of the United States, which will admit them, where slavery is not tolerated; to the end that my said slaves be free; and in the event that no State or territory will admit said slaves as residents, to be free, then it is my will, that my said executor shall transport said slaves to the colony of Liberia, in accordance with the advice, rules and regulations of the Colonization Society.

Item sixth. It is my will and desire that after the death of my wife, that my executor shall sell all of my estate, (the slaves excepted,) upon such terms, private or public, as to my executor shall seem best, and that the money arising from such sale be applied by my executor in aid of carrying out the provisions in the fifth item of this will; and if there should not be sufficient to enable my executor to carry out said fifth item, he is hereby authorized, after the death of my said wife, to hire out said slaves until he shall realize sufficient, together with the amounts raised from said sale aforesaid, to render it practicable for my said executor to carry faithfully into execution the said provisions contained in said fifth item."

Counsel for Jane Bivins, (the wife of Thomas Bivins, and to whom, in the first item of the will, was given all of the testator's property, real and personal, of what kind soever, during her natural life, and at her death to be disposed of as thereinafter directed,) moved the Court to set aside the probate of the fifth and sixth items of said will, and declare said Thomas Bivins to have died intestate, as to the slaves, and the disposition made thereof, upon the ground that said Court of Ordinary had no jurisdiction to admit the same to probate, and because said fifth and sixth items of said will are contrary to the statutes of the State of Georgia.

The Court refused and disallowed said motion as to the said fifth item of said will, and refused and disallowed said motion as to said sixth item, except the words following, which occur in said sixth item, as to which, it was ordered and adjudged they be stricken and expunged from the record, viz:

"And if there should not be sufficient funds to enable my executor to carry out said fifth item, then he is hereby authorized, after the death of my said wife, to hire out said slaves until he shall realize sufficient, together with the amount raised from said sale aforesaid, to render it practicable for my said executor to carry faithfully into execution the said provisions contained in said fifth item."

To which decision counsel for plaintiff excepted, and has assigned error.

M. H. Blanford, for plaintiff in error.

S. H. Crawford, for defendant in error.

By the Court.—Lumpkin J. delivering the opinion.

We are unable to distinguish this case from that of *Thornton vs. Chisholm*, (20 *Ga. Rep.* 338.) True, that in that case, there were words of present manumission used in the instrument. "I have manumitted and set free, and do manumit and set free," &c. But the Court laid no stress upon this language in the decision.

These negroes were the property of Mrs. Bivins till the moment of her death. The instant afterwards they were, by the terms of the will, freemen in this State.

But were this not so, we are inclined to think, that policy forbids that such a construction should be put upon our anti-emancipation laws, as to allow negroes to remain in our midst, who are ultimately, after the termination of one or more lives, entitled to their freedom. The case of *Smithwick vs. Evans*, decided at this Court six months since, and not yet reported, is supposed to be entirely similar to this case. Not having been present when that case was heard, I cannot say.

I would merely add, that so far as testamentary disposition is concerned, one part of a will may be stricken out and the rest stand. But not so as to the construction of the instrument. To ascertain the intention of the testator, we must look to the entire instrument.

Judgment reversed.

WILLIAM B. SHAVER, plaintiff in error, vs. MACK W. MCLENDON, defendant in error.

By mistake, a forthcoming bond was made payable to *James* B. Shaver instead of to *Wm*. B. Shaver.

Held, That Wm. B. Shaver might sue at law on the bond, and show the mistake there.—BENNING J.

Suit on bond, from Marion. Tried before Judge WORRILL, March Term, 1858.

This was an action of debt on a bond. The plaintiff, Wm. B. Shaver, had obtained execution in a Justices Court against A. J. Simmons, James M. Adams and James M. Davis, and had it levied upon a bale of cotton. A claim was interposed by one Sidney B. Simmons to said cotton, and through mistake, the bond for the forthcoming of the same, was made payable to *James B.* Shaver, when it was the intention to make it payable to the plaintiff in *fi. fa.* The claim was tried, and the cotton found subject to the *fi. fa;* and the sale again advertised, when the property was not forthcoming to satisfy the demand of the plaintiff.

The plaintiff then brought suit on the bond, and offered on the trial in evidence, the bond made payable as before stated; and further proposed to prove, that the same was made payable to said *James* B. Shaver by mistake; and that said James B. had no execution in said Court; and also offered said *fi. fa.* in favor of plaintiff, together with the claim; the verdict of the jury finding the property subject to the *fi. fa;* also the judgment of the Court on the verdict, and also to prove by the constable levying the *fi. fa.*, that he advertised said property, and that the same was not forthcoming, and also the value of said property levied on; to all of which testimony the defendant's counsel objected, upon the ground that it was an attempt to correct said bond, and if the plaintiff had any remedy, it was in a Court of Equity.

Which objection the Court sustained, and on motion dismissed plaintiff's action; whereupon, plaintiff by his counsel excepted, and assigns the same as error.

Blanford & Crawford, for plaintiff in error.

Davis & Hudson, for defendant in error.

By the Court.—**Benning** J. delivering the opinion.

It is admitted on all hands, that the plaintiff might recover on this bond and his offered proof, in equity. But what is there to prevent him from doing so in like manner at law. I think, there is nothing. "Whenever" "a plaintiff or complainant shall conceive, that he she or they, can establish his her or their claim, without resorting to the conscience of the defendant, it shall and may be lawful for every such plaintiff or complainant, to institute his her or their action upon the common law side of the Court, and shall not be held to proceed with the forms of equity; any law or usage to the contrary notwithstanding." *Cobb Dig.* 464.

This, as it seems to me, is an authority to the plaintiff to proceed at law in this case. I therefore, think that the Court erred in not admitting the evidence, to the mistake.

Judgment reversed.

Lumpkin J. concurring.

McDonald J. dissenting.

I think the decision of the Court below ought to be sustained. I know of no precedent or authority for going to the extent proposed here. The suit is on a bond. The obligor's name is wrong, and it is proposed to make that right by averment and proof. The bond was given on filing a claim. The condition of the bond recites, that *James A. Davis* was the plaintiff in the *fi. fa.*, and that Albertus J. Simmons and James W. Adams were security. The *fi. fa.* to support the recital, is in favor of William B. Shaver, as plaintiff, and against A. J. Simmons, James M. Adams and *James W. Davis,* defendants.

Perhaps, in States which have no Courts of Chancery, this kind of proceeding might be allowed, but certainly on no *legal* principle. The case of *Isaac Coleman vs. John Crumpler et al., (2d Dew. Law Rep.* 508,*)* is very much like this. That was a suit on a bond in which A. and B. were defendants. It was held, that the record of a suit in which B. and C. were defendants, did not support the breach assigned, and that parol evidence that the name of C. was inserted in the bond by mistake, instead of the name of A., was inadmissible. The Chief Justice, in delivering the opinion of the Court, said that it was too well settled to require either argument or authority to show, that a written document cannot, by parol, be made to mean any thing but what its word, that is, itself imports. It certainly cannot be contradicted. He said he entered not into the doctrine of ambiguities, either latent or patent. The case did not require it. He remarked further, that parol evidence could not *bend* the bond to the record, nor the record to the bond. The bond is the contract of the parties, and to say that a wholly different contract may be set up by parol, from that which the writing between the parties makes, in a Court of Law, when a party, against whom the evidence is to operate, cannot complain, or admit, or deny, is to open the door to great mischiefs, and to place more reliance on the frail memory of witnesses, than on an infallible writing. I think the presiding Judge ruled correctly, and that his judgment ought to be affirmed.

THOMAS A. WATTS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

A demand to entitle the accused to a discharge under the 18th section of the 14th division of the Penal Code, must be made, not later than the second Term after the indictment is found.

The State may continue a criminal cause without being compelled to make a showing.

Adultery, in Sumter county. Decision by Judge ALLEN, March Term, 1858.

When this case was called, the Solicitor General asked the Court to continue it, and defendant objected.

At September Term, 1857, defendant made demand for trial in terms of the statute, there being a jury empanneled and qualified to try him, which was entered on the minutes. At March Term, 1858, defendant again demanded a trial and moved to have the same entered on the minutes, which the Court refused, and defendant excepted.

Counsel for defendant then moved he be discharged and acquitted of said offence, if a trial was again refused, and requested the Court to have said motion entered on the minutes; both which said motions, the Court refused, and defendant again excepted.

Defendant then objected to the continuance of said case, upon the ground of said demand having been made at the previous Term, and that the State had no right to continue a case upon motion, without any showing made, and there was none made here.

The Court overruled defendant's objection, whereupon defendant excepted. And on these several exceptions assigns error.

TUCKER & BEALL, for plaintiff in error.

Sol. Gen'l, EVANS, for defendant in error.

By the Court.—Lumpkin, J. delivering the opinion.

Both points in this case are fully covered by a decision made by this Court at Atlanta, last March; and not yet published. I refer to the case of *Price vs. The State.*

The 18th section of the 14th division of the Penal Code, authorizes the defendant in all other than capital felonies, to demand a trial at the Term, when the indictment is found, or at the next succeeding Term thereafter; and if the accused shall not be tried at the Term when the demand is made, or at the next succeeding Term thereafter; *provided,* that at both Terms, there were juries empanneled and qualified, to try the prisoner, then he shall be absolutely discharged, and acquitted. *Prince* 661.

Can the privilege here given, be extended beyond the second Term of the Court, without adding to the statute? Principle would seem to forbid this interpretation, however necessary and proper, such a provision may be. And then, as to the expediency of giving to this clause of the code the construction claimed for it, Circuit Judges and Solicitors, unite with one voice in assuring us, that the practical operation of this exposition of the law, is highly prejudicial to the enforcement of the criminal justice of the country.

As a matter of principle then, as well as of policy, we are inclined to return to the plain language of the law. Nobody has been hurt; no contracts vacated; no wills set aside. We do not say, either, that prisoners are without remedy. We are not prepared to hold, that they may not force a trial, by giving notice to the State, under the rule of the common law. 1 *Chitty's Crim. Law,* 397, 489.

The provision in the code, may have been intended as a substitute for this common law rule. If so, it needs legislation.

As to the complaint against the practice of allowing the State to continue without being compelled to make a showing, it is not decreed, that it is in accordance with the English practice, and we are not aware, that it has been changed by our code. The same result would follow, provided the State were coerced to trial against her will. A *nol. pros.* would be entered; and the prosecution renewed.

Let the Legislature speak authoritatively upon both of these questions.

Judgment affirmed.

JOHN AVERY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

When and under what circumstances a mistrial will be declared, is a question, pretty much in the discretion of the Court.

A new trial will not be ordered, upon the ground of newly discovered evidence, when the party has been guilty of gross *laches* in not having obtained it on the trial of the case. Nor where if introduced, it could not possibly change the verdict.

Assault, with intent to murder: Motion for new trial from Sumter county. Tried before Judge ALLEN, March Term, 1858.

John Avery, the defendant below, was put upon his trial for an assault with intent to kill Irwin T. Harrell, and pleaded not guilty.

George T. Wilson as one of the panel of jurors, came to the book to be sworn, and the State objected on the ground, that he was intoxicated, and the Court rejected him as a juror, without hearing any evidence as to the fact of his really being intoxicated. The Court examined the juror himself, and it was perfectly plain to every body, that he was intoxicated. Defendant thereupon excepted.

The State proposed to prove the number of scholars in the school-house at the time of the shooting. Defendant objected on the ground, that the indictment did not charge the defendant with shooting at any one except Harrell, which objection was overruled, and defendant excepted.

J. T. Harrell sworn for the State says: He heard a gun fire when he was in his school room on the 17th August, 1857. Defendant was standing sixty or seventy yards therefrom with a gun in his hand, and smoke arising therefrom. Witness had just passed the door; some of the shot struck the outside of the door, some went through the crack and stuck in the other side of the house; there were about twenty scholars in the house at the time. Defendant lived about one hundred yards from the school house, and had previously said he would shoot witness' brains out or the brains of some of the scholars, on Thursday before the shooting. Manifested ill-will the whole of the year, said he would keep them out of his field, if they did not keep themselves out. Witness promised to keep the boys out of his field. One of the boys accidentally knocked a ball into defendant's field, and witness asked permission for them to go and get it. Defendant threatened to break up the school. The shot were between the size of a duck shot, and buck shot; no one was struck by the shot.

James McDonald, one of the scholars testified about the same. That it was a single barrelled gun.

William R. Harrell was there; thinks defendant shot at J. T. Harrell, more than any one else, and testified about the same as the other witnesses. On Thursday or Friday, saw defendant going along, making threats, in an angry manner; did'nt understand what he said. Knew it was defendant who shot, and saw him immediately after.

John Jarrell testified to about the same.

Joel Logan was there at the time, when defendant shot into the school house; saw defendant with a gun in his hands, standing still; he supported the testimony of the other witnesses.

Caleb Jones, had two conversations with defendant about the school, in which defendant stated, that the scholars were intruding on him, that there was some misunderstanding between him and the scholars, and also between him and Harrell, the teacher, and if they did'nt mind, he would shoot Harrell. That the school house was not on his land, but that Knight put it there to devil him; that the children wanted to get water out of his well, but he would not let them, and if they did not mind, some of them would get shot; that before he would be outdone, he would do it. Saw defendant twice that day. Witness entertained bad feelings towards defendant; was sworn twice before in this case, as defendant's witness. Was sent for by defendant to Terrell county, by a bailiff.

None of the witnesses saw the actual firing of the gun by defendant, but all saw him with the gun in his hand, standing in the cornfield a short distance from the house; no one with him, and nothing to obstruct a distinct view of him; he had a gun in his hand and smoke was rising from the gun or about him; defendant was facing the door; after firing stood awhile, short time, and walked away.

The defendant introduced no evidence; requested the Court to charge the jury, that unless they believed from the evidence that the defendant intended to kill Irwin T. Harrell, they must acquit the prisoner.

The Court refused to charge as requested, but charged the jury that if they believed he shot into the school house with an intention to kill any one, with an indifference as to who he should kill, they must find the prisoner guilty.

To which charge and refusal to charge, the defendant excepted.

The Court charged the jury, that previous threats were evidence of malice, and defendant excepted.

The jury returned a verdict of guilty.

The defendant moved the Court for a new trial, upon the grounds to which defendant excepted to the ruling of the Court in the progress of the trial; and also, upon the following additional grounds:

That the Court erred in holding, that the defendant could be put upon trial again, when at a previous Term of the Court, there had been a mistrial declared without the consent of the defendant, and that the verdict was contrary to law and evidence, and on the ground of newly discovered evidence, as appeared from the affidavits of Salter and Gaines.

There was an affidavit of Moses Avery, son of defendant, stating that defendant on the evening of the 16th August, left home to go down to the house of M. G. Garner, and did'nt return until the evening of the 17th; that before dinner of the 17th witness shot a shot gun at a bird, some eighty or ninety yards' from the school house, in the cornfield, but with no intention of hitting the school house; that he was at home all that day, and heard no gun except the one he shot at the bird, and would have heard one, if it had fired.

Salter made affidavit that defendant came to his house on the 16th, Sunday; and next morning 17th August, 1857, went over to the house of Cox, Justice of the Peace, and took out an attachment against Caleb Jones, and returned to witness' house, between ten and eleven o'clock, A. M., and remained there until between two and three o'clock, P. M. Deponent lived over two miles from the school house, and knew that defendant could not have been at the school house at eleven o'clock, A. M. on the 17th August, 1857; that said attachment was levied at half after eleven o'clock, A. M. on that day.

Salter swears in his affidavit, that he saw defendant at Branchville depot, over two miles from the school house at ten o'clock, A. M., and defendant remained there until half past eleven o'clock, A. M. Garner lived near Branchville, just in sight.

The witnesses for the State testified the shooting to be about eleven o'clock, and that it was not Moses Avery who shot, for they knew him, and defendant too.

The Court overruled the motion for a new trial and, defendant excepted, and assigns error.

Tucker & Beall, for plaintiff in error.

Sol. Gen'l, **Evans**, for defendant in error.

By the Court.—**Lumpkin** J. delivering the opinion.

We have carefully examined the various grounds upon which the motion for a new trial was moved in this case; and feel satisfied that the Court was right in refusing the application.

As to the fifth ground, that the Court erred in holding, that the defendant could be put upon his trial again, when at a previous Term of the Court, there had been a mistrial declared, without the consent of the accused, this Court held in the case of *Williford against the State*, 23 *Ga. Rep.* 1, that at what time, and under what circumstances the Court would discharge the jury from the further consideration of of a criminal case, is a question left pretty much to its own discretion, and that the doctrine, that a mistrial amounts to an acquittal, has long since been exploded.

As to the newly discovered evidence, no reason is shown, why it was not offered on the trial. The witnesses were living in the immediate vicinity of the defendant; and the *alibi*, of course, well known to him, if indeed it was true. That is not all: the newly discovered evidence is reconcileable with the other proof. There is really no conflict. It is a mere difference of opinion, as to the time of day when the shooting took place, about which, the witnesses might very naturally be mistaken. In this remark, we do not include the testimony of the son, respecting which, delicacy forbids that we should make any comment.

But all this proof, if introduced, could not change the verdict. The testimony is overwhelming, that John Avery discharged the gun. He was distinctly seen and fully identified, both by teacher and pupils, who knew him intimately and well. And that is not all: the crime was committed in the execution of a previous threat. The accused suffered himself to be overpowered by the worst passions of our nature.

The judgment must be affirmed.

Judgment affirmed.

JOHN DOE, *ex dem.*, JOHN CUNNINGHAM, plaintiff in error, vs. RICHARD ROE, cas. ejector, and HENRY BRADLEY, SARAH BASS, and RICE BASS, tenant, &c., defendants in error.

The plaintiff in ejectment may amend by striking out two of three defendants and proceeding against the remaining third.

The question as to who may be joined as defendants in an action of ejectment, considered.

Ejectment, from Sumter county. Tried before Judge ALLEN, March Term, 1858.

This was an action for a lot of land, and was tried on the appeal. Plaintiff submitted a copy grant for the lot from the State to himself, and proved that defendants were in posession about the time suit was brought. Defendants' counsel showed they were not joint tenants or tenants in common, but held by separate and independent possession derived from different parties, and not being contemporaneous, or derived from the same source, the plaintiff's counsel objected to this, contending that this fact depended upon the deeds in writing, and could not be proved by parol testimony,

The Court admitted the proof, and plaintiff excepted.

The defendants moved for a nonsuit, which motion the Court granted, and plaintiff excepted, and at the same time, asked to be permitted to amend by striking out from the declaration the names of Sarah and Rice Bass, which the Court refused, and plaintiff excepted.

Plaintiff proposed to open the case again, and introduced proof of a joint tenancy on the part of the defendants, which the Court refused, and plaintiff excepted.

The Court then ordered a nonsuit. Bradley was at the time of the commencement of the suit in possession of the east half of said lot.

Upon these exceptions, error is assigned.

Sullivan; **Worrill** and **Hawkins**, for plaintiff in error.

A. R. Brown, for defendants in error.

By the Court.—**Lumpkin** J. delivering the opinion.

This writ is in the usual form of an action of ejectment, claiming *mesne profits.* There were three co-defendants; it turned out upon the trial from an examination of the plaintiff's own witnesses, that their possession was not joint; but that they claimed under different titles, and had taken possession of the land at different times. The defendants moved a nonsuit on that account; that is, the misjoinder of the defendants, which the Court sustained.

The plaintiff proposed striking out two of the three defendants out of the writ, and proceeding against the third; which the Court would not allow.

The plaintiff then asked to re-open the case, and show that the defendants were joint tenants; and this the Court refused to permit.

Without pronouncing any judgment upon the first and third grounds, we are clear, that the Court was wrong in refusing to permit the plaintiff to strike out two of the defendants and proceed against the third. We see no possible objection to that.

Conceding that the defendants in ejectment claim different parcels of land under distinct titles, we see no insuperable difficulty in allowing a joint action to be maintained against them; so far as recovery of the possession is concerned. True, it would complicate the defence of each tenant with that of his co-tenants. And it might become necessary to render separate verdicts against each, for the land held by him. In New York, this is done daily; and it would certainly save a multiplicity of suits.

This question underwent some examination in the case of *McGuire's children*, 17 *Ga. Rep.* 303. We there held, and no doubt properly, there could not be a joint recovery, for *mesne profits*, against defendants, who held severally and not jointly. But as *mesne profits* cannot be recovered in this State in a separate action, in order to give force and effect to the statute, would it not be proper to hold, that the damages might be apportioned out against the several defendants, according to their respective possessions? One execution might be issued against all, the amount to be collected out of each being specified, or separate *fi. fas.* against each. The cost might create some trouble.

Although, as we have said, it would make the defence a little more complex; yet in the end, it would save time and expense. And it would be productive of this additional advantage, that all the defendants would have an opportunity of combining to resist the plaintiff's title. For that would be common to all. See 1 *Chitt. Pl.* 86, *and notes;* 5 *Johns. Rep.* 278; *Serg. & Raule* 435; 7 *Wendell,* 182; 5 *Vermont,* 251.

Judgment reversed.

WILLIAM NEWSOM, ex'or., plaintiff in error, vs. JOHN JACKSON, defendant in error.

[1.] Parol evidence inadmissible when there is written evidence of the contract within the power or control of the party.

[2.] To make a third person not a party to the contract liable upon a false representation as to the solvency of another, it must appear *at least* 1st, that the entire credit was given upon these representations; 2d., If it were not a single transaction, then there must be some reasonable certainty as to the amount of the credit and the length of time to which it should extend; and 3d, that the party giving the credit was not himself the victim of blind credulity or overweening confidence.

Deceit, from Baker county. Tried before Judge ALLEN, May Term, 1858.

John Jackson brought his action of deceit against William Newsom, executor of Cæsar A. Savage, alleging that he was damaged by the representations of Savage, to wit—that one Pembroke P. Bond was solvent and responsible, and that thereupon he had credited the said Bond for merchandize, &c., for which said Bond never paid him, and is insolvent and unable to pay; that said Savage represented that said Bond owned several negroes and other property, and that said Savage perpetrated a fraud upon plaintiff, and was interested in so doing, &c.

The jury found a verdict for plaintiff; whereupon the defendant moved for a new trial upon the following grounds:

1st. That the Court erred in not sustaining the demurrer of defendant to plaintiff's declaration, on the ground that said declaration contained no sufficient cause of action.

2d. Because the Court erred in permitting the evidence of Pembroke P. Bond and Israel Bond to be read to the jury, against the objection of defendant's counsel, as to the negro property in possession of Pembroke P. Bond, being the separate property of the wife of Pembroke P. Bond, or any part of said answer, going to show that the wife of Bond had a separate property, or that the same was secured and settled on her.

3d. Because the Court erred in permitting Lott Warren to testify against the objection of defendant, that Savage, after P. P. Bond quit business in Albany, took an assignment from Bond of his account for work done in his shop.

4th. Because the Court erred after charging the jury in the language as requested in writing, by defendant; that if at the time the representations were made by Savage, no account was made or intended to be made by Bond, but was subsequently made from day to day, week to week, and monthly, from the first of January, 1847, or from the time the account was opened until closed, then the defendant is not liable on the representations charged in addition thereto, "unless said Savage, by his representations, intended to cover such account as might be made by Bond for the whole year."

5th. Because the Court erred in charging the jury that they must be satisfied, from the testimony, that the defendant made the representations charged in the declarations falsely and fraudulently.

That the defendant, at the time of making the representations, knew them to be false.

That the defendant, in making the representations, either intended to benefit himself or to deceive or injure the plaintiff.

That the plaintiff must prove that he acted on the faith of said representations, having sold goods on account of them, and thereby lost his debt.

That if the jury believe, from the testimony, that Savage, at the end of the year after the account was opened with plaintiff, claimed all bonds, notes and accounts, and took possession of them, it is a circumstance they may consider in determining whether or not there was collusion between Bond and Savage to defraud plaintiff.

6th. Because the verdict was contrary to the charge of the

Court in this: that they must be satisfied defendant represented falsely and fraudulently.

That if the representations of defendant, on which plaintiff relies, in regard to Bond's being good, stated no amount for which he was good, then plaintiff cannot recover. That if at the time no account was made or intended to be made, but was afterwards made daily, weekly and monthly, from the time it opened until it closed, then the defendant is not liable on the representations unless they were made to cover the account for the whole year.

That if after representations and while the account was being made, plaintiff had other sources and opportunities to learn the condition of Bond, whether he was fit to be trusted, and neglected so to do, but blindly trusted to the representations of defendant, he cannot recover.

That if he regarded defendant's representations as security or as a promise to pay the debt of Bond, then he cannot recover.

7th. Because the verdict of the jury was contrary to evidence.

8th. Because the verdict was contrary to law.

9th. Because the verdict was contrary to the weight of evidence.

Brief of evidence.

Pembroke P. Bond says he moved to Albany about first of February, 1847, and soon after opened an account with plaintiff. I proposed it, and he didn't object. Don't know how long it was before he became aware that the negroes in my possession didn't belong to me. Defendant and other persons in Albany knew my pecuniary situation, and plaintiff had as good chance as other people in Albany to find out. Paid plaintiff part of his debt. I told plaintiff, near the end of the year, the negroes belonged to my wife's trustees. At the time I went to Albany I owed more than I could pay.

Defendant was aware of it, and that the negroes were my wife's. He came to Augusta and advised me to move to Albany; stood my security on a bail process in Augusta, and borrowed money to enable me to remove.

Israel Bond said, at the time referred to, P. P. Bond was embarrassed pecuniarily, and owned no property. Defendant was acquainted with his circumstances; supplied him with money to remove, and became surety for him on bail bond about the time. Defendant asked me if Bond's wife's property was secured to her; and I exhibited to him the marriage settlement showing the fact.

James M. Thornbury said he was clerk for plaintiff; sold goods to Bond and his family on defendant's representations; that defendant came into the store, said his brother-in-law, Bond, was coming to Albany to do business in carriages, and he wished Jackson would help him in custom all he could: and in return Bond would do all his trading with Jackson, and that Bond was perfectly responsible, as he owned in his own right eight or ten likely negroes. Bond closed his account by note (which was exhibited) and it has never been paid, to witness's knowledge. Thinks after he closed his account by note, his credit was discontinued. Plaintiff considered Savage as security for Bond, and did not trouble himself with Bond's habits or actions.

Lott Warren said, when Bond came to Albany he loaned Bond a set of blacksmith's tools, and when Bond left he went after them, and found them claimed by Savage. Got about half of them by identifying them. Owed Bond a small account, which was in Savage's hands, who claimed to have taken it in order to indemnify himself, saying he was a large loser by Bond. He was idle, extravagant, and imprudent, but he would have trusted him on the representation defendant made to plaintiff.

S. D. Irwin called on defendant for rent of the shop, used by Bond; defendant refused; said he was largely loser for board, &c.

Platt testified he was in debt when he went to Albany; was extravagant, reckless and imprudent.

The Court overruled the motion for a new trial, and defendant, by his counsel, excepts.

Lyon & Clark, for plaintiff in error.

Morgan, for defendant in error.

By the Court.—**Lumpkin**, J. delivering the opinion.

[1.] The judgment of reversal in this case is put upon the ground that the witnesses, P. P. Bond and J. Bond, were permitted to testify against the objections of defendant's counsel. That the negroes in the possession of P. P. Bond were the separate estate of his wife, and not liable to the husband's debts, whereas the contract of settlement was certainly the highest and perhaps the only proof which was admissible as to the title of this property. In the narrative which is given in the bill of exceptions of the facts which transpired on the trial of this cause, no statement is made that the defendant objected at the time to the introduction of this testimony. But in the motion for a new trial, it is set forth that the objection was made. And in the judgment of the Court overruling the motion, on all the grounds taken in it, Judge Allen certifies that, on the trial of the cause, he "ruled and charged, and refused to charge, as is stated in the grounds taken for a new trial." A wise precaution—the omission to observe which has worked an injury, no doubt, in some of the cases which have come before the Court since the Act of 1856 was passed.

Upon this ruling, then, there can be no doubt the defendant is entitled to a new trial. The testimony of the two Bonds constitutes one of the most material facts in the cause; for the main misrepresentation imputed to Savage is, that he asserted that P. P. Bond was the owner of the slaves in his possession. Whether he is or is not, depends upon the deed of settlement; parol evidence of the contents or legal effect of which was allowed to go to the jury.

This is an action of deceit, and it is exceedingly questionable whether it survives against the legal representive of Cæsar A. Savage. Had the property of Jackson been added to the estate of Savage, as in cases of conversion, the suit might have survived, though sounding in *tort*. But it is not pretended that such was the nature of the transaction. The writ charges no collusion or combination for this purpose; but we pass this point by, as it does not seem to have been directly decided by the Court below.

[2.] Mr. Butler, in the very thorough argument which he submitted in behalf of the plaintiff in error, has, we think, gone very far to establish the following propositions: That the case of *Pasley vs. Freeman* (3 *T. R.* 51, 2 *Smith's Lead, Cas.* 55) and the cases following that decision, do not go the length of sustaining this action. All these cases were confined to a single transaction, and the liability was not extended beyond it; and not one of them, like this, sought to bind the defendant during the business transactions of eleven months; and for an unrestrained credit given on an unlimited account, *Haycraft vs. Geary*, 2 *East* 92; *Eyre vs. Dunsford*, 1 *East* 318; *Tapp vs. Lee*, 3 *Bos. and Pull.* 367; 1 *Taunton* 563.

That in the case at bar there was an utter want of diligence, such as was incumbent on the plaintiff to use; and his negligence was in no manner caused by the Act or practices of the defendant. That where the affirmation is such as to leave the other party free to exercise his own judgment or prosecute his own inquiries in order to ascertain the truth, and when by common prudence he might protect himself against imposition, it is his own fault if he fail to do so, and no right of action arises. 1 *Story's Eq. Jur. sec.* 199; 2 *Kent's Com.* 485, 487; 2 *Parsons on Contracts* 268; *Sug. on Vend* 2, 3, 4; *Peasley vs. Freeman*, 3 *T. R.* 51; *Sanders vs.*

Hallerman, 2 *Iredell* 34; *Vernon vs. Keys*, 12 *East* 632; *Duke of Beaufort vs. Neeld, cited in note to Burns' Legal Maxims, top p.* 490; *Gallager vs. Bunnel*, 6 *Com.* 352; *Salem India Rub. Co. vs. Adams* 23 *Pick.* 265; *Downs vs. King*, 1 *Stark R.* 75 (12 *E. C. and R.*) If a tradesman gives an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned by it. 5 *Carr and Pa.* 363 (*Corbett vs. Brown;*) and that the amount, for which the representation intends to say, the person for whom it is made is good, should appear with reasonable certainty in the representation.

What are the facts here? Jackson doing business in the same place with Bond, and having daily opportunities of seeing his management; at no time and no where, used any effort to ascertain the true condition of Bond or state of his circumstances. But in the language of one of the witnesses (Thornbury) relying on Savage as security for Bond, continued to credit Bond for nearly a year, intending to hold Savage liable for the price of the goods. I need hardly remark that if this were the understanding, that Savage had become security for Bond, then the case is clearly within the statute of frauds, and this suit cannot be maintained.

Neither Courts of Equity nor Courts of Law will aid parties who will not use their own sense and discretion in matters of this sort. 1 *Story's Eq. Jur.* 199.

Chancellor Kent (2 *Com.* 485, 487) says: "The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence or folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith, to every extent compatible with the interests of commerce." The adjudged cases coincide with the elementary authorities as to these principles; and that, too, as between vendor and vendee. Should not a still stricter rule be applied and enforced when it is sought to charge a third person for the debt or default of another?

Pusley and Freeman was the first case where an action was sustained upon a false representation made by a third person, and one who was not a party to the contract; an opinion not unanimous, but in which there was a divided Court, made in 1789, several years after the date even of our adopting statute, and many years subsequent to the Revolution; one which has been repudiated by many able Courts and Judges, cordially supported by none, and very grudgingly by those who have followed it as a precedent. The principles of which were finally discarded by the British Parliament as an evasion, if not a repeal, *pro tanto*, of the 4th section of the Statute of Frauds; we can hardly feel ourselves bound to rely upon it in this State. And however anxious we may be to frown down any violations of the rules of morality in the dealings which men have with each other, still something more than a departure from these rules is necessary to maintain an action at law.

In ninety-nine cases out of a hundred, the person giving the credit does not look to the referee; for if he did, he would see to it that he was bound by some writing for the undertaking of the other. He does not require this for the simple reason that he knows the referee would refuse to become security. It is the last thing *he* intends to do. Indeed, this and all such cases are an after thought. An attempt to enforce a liability that never existed, or else to charge one upon a contract void by the statute.

Judgment reversed.

Jonathan Smith, et al., plaintiffs in error, vs. **Barden Walden**, guardian, et al., defendants in error.

When the submission is to three arbitrators, an award by two, is not valid.

In Equity. Motion to dissolve injunction, and to dismiss bill, in Randolph Superior Court. Heard by Judge Kiddoo, at chambers, February, 1858.

This was originally a controversy in relation to certain negroes. The parties agreed to submit the matter to arbitration, under the Act of 1856. Two of the arbitrators made an award, from which the third arbitrator dissented—did not join in the same, and entered his protest against it. The award thus made, was presented to the Court, and on motion made the judgment thereof, and the administrator was proceeding to sell the property for distribution, agreeably to said award and judgment, when the guardian of some of the infants, and others interested, filed their bill in equity to enjoin said sale, and to set aside said award—charging that there was fraud in the submission, and that the award was null and void, all three of the arbitrators not agreeing or assenting thereto. There were other allegations and statements in the bill, which it is not necessary to refer to. Upon the coming in of the answers, defendants moved: 1st. To dissolve the injunction. 2d. To dismiss the bill for want of equity.

The Court refused both motions, and counsel for defendants excepted.

Douglass & Douglass, for plaintiffs in error.

Perkins; and **Hood & Robinson**, *contra*.

By the Court.—**Benning** J. delivering the opinion.

The questions in this case depend on whether, the award was valid. If it was valid, it was a bar to the bill.

But we think, that it was not valid.

The submission was to three persons, the award was made by only two of them, the third protesting against it. And it is a general principle, that a power to three, cannot be executed by two. This principle extends to the case of arbitrators. *Rus. Arb.* 208.

The Act of 1856, as to arbitrations, does not change, or touch, this principle. The fact, therefore, that this arbitration, was under that Act, can make no difference. *Acts of* 1856, 222.

We think, then, that the award was no bar to the bill, and therefore, that the Court was right in overruling the motion.

Judgment affirmed.

THE MACON AND WESTERN RAILROAD COMPANY, plaintiff in error, vs. MALINDA WINN, by her next friend, CICERO A. THARPE, defendant in error.

Courts will interfere cautiously with the verdicts of juries in cases of tort, merely on account of the excess of the damages. They will, nevertheless, set them aside, and send the case back for the consideration of another jury, where the amount is so extravagantly large as to leave no room to doubt but that the jury were governed by passion, prejudice, partiality or corruption.

Where the safety of a person is put in imminent jeopardy, by the gross negligence or want of ordinary care, by the servants of a railroad, and in attempting to escape injury, is seriously damaged, it is no relief to the company that the person misjudged as to the danger, unless the plaintiff acted from a rash misapprehension as to their true situation.

Case, and motion for new trial, in Bibb Superior Court. Tried before Judge POWERS, at November Term, 1857.

This was an action on the case, brought by Malinda Winn, a minor, by her next friend, Cicero A. Tharpe, against the Macon and Western Railroad Company, to recover damages for injuries received by plaintiff, from the negligent running of their cars. The case was submitted to a special jury on the appeal, who found for the plaintiff seven thousand dollars. Whereupon, defendant moved for a new trial, which the presiding Judge refused, and defendant excepted. All the facts necessary to a full understanding of the points adjudicated, are stated in the opinion of the Court, pronounced by Judge Lumpkin, in the concurring opinion of Judge McDonald, and in the dissenting opinion of Judge Benning.

Cole; and Nisbet, for plaintiff in error.

Baily; Whittle; and Trippe, *contra.*

By the Court.—Lumpkin, J. delivering the opinion.

When this case was up before, one of the grounds of complaint was, the excessive damages awarded by the jury; the verdict then, as now, being for $7,000. As the Court determined to grant a new trial for other reasons, they deemed it best to express no opinion upon this, but refer it back for the consideration of another special jury, under the law as laid down by the Court. There is no complaint that the rules of law governing the case, were not properly given on the last trial, and still, the jury have found the same amount. And the only question which we propose to examine now, is, whether the verdict shall be set aside for excess? As to the exceptions taken during the progress of the trial, we are unanimous that there is no merit in them.

As to what constitutes negligence or reasonable care, the position of this Court has invariably been, that whether the facts relied upon to establish the one or prove the exercise of the other, are true, is to be left to the jury; and that each case must depend upon its own circumstances. And this doctrine, notwithstanding the conflict of opinion in some of the State Courts, is maintained by Mr. Pierce, citing in its support, the decisions of this Court, and numerous authorities, both English and American. See *Treatise on American R. R. Law*, 282 *et seq.*

What, briefly, is the truth of this transaction, to be fairly deduced from the testimony?

In December, 1851, Mrs. Winn is returning from a visit to Crawford county, to her home, near the Macon and Western Railroad, in the neighborhood of Forsyth, Monroe county. She is traveling in her rockaway, with four children, with a negro driver, and team of mules. She had reached a point where the public highway crossed obliquely the railroad track, and was within a few yards of the latter, when the down train of cars from Atlanta to Macon, emerged from a cut, some two hundred yards or more above the crossing, and was seen coming with its usual speed of some eighteen or twenty miles an hour. Situated as the parties were in the carriage, the train appeared to be almost directly in front of them. Mrs. Winn directed the boy to halt. The evidence of the employees of the company is, that the driver seemed to be reining up his mules; and it is likely that there may have been a momentary pause at this juncture. The boy, however, who is proven to have been sober, and a highly trustworthy servant, calculating the chances, decided promptly that his safest course was to push across the road, ahead of the train. Perhaps, the preponderance of proof, from actual measurement, is, that he might possibly have turned round and retreated to a more remote position; but considering the nearness of the fence on his left, and other obstructions, this is somewhat questionable.

It has occurred to me, that looking to the safety of the family alone, perhaps the wisest course would have been to have let out the passengers, leaving the mules and the vehicle to the chances. But when it is recollected, that it was a female and four helpless and dependent children who occupied the carriage, and that, likely the train was not more than fifteen seconds in reaching the crossing, from the time it was first discovered, it will be readily perceived what little time there was for deliberation. Upon a calm and dispassionate view of the whole facts, sound judgment will approve of the determination of the driver; and that was, to cross the road ahead of the train. It is conceded on all hands, that this was entirely practicable, but for the unforeseen misadventure which thwarted the attempt. When the mules were on the track, they obstinately refused, from fright or some other cause, to proceed forward, in despite of the most strenuous efforts and appliances used by the boy, to urge them forward. And then it was that the whistle was sounded, the steam reversed, and the breaks were put on; but it was too late. The driver was struck on the head by the smoke pipe of the engine and killed; the mules were cut loose from the rockaway and ran off; the carriage was taken up by the cow-catcher, and the wreck, after scattering the fragments all along by the way, was carried two hundred and seventy yards before the train was stopped. Mrs. Winn was found at some distance below the crossing, on the side of the road; the children, and ruins of the rockaway, were on the cow-catcher; the head of one of the children, swears one witness, was through the bars of the cow-catcher. One of the children expired immediately; two others survived a short time and died. Mrs. Winn's arm was broken, and she otherwise greatly bruised; and the serious injury inflicted on Malinda, to compensate for which this suit is brought. Her skull was fractured back of the ear, and the bone pressed in upon the pupil of the eye. The deformity is apparent and permanent. How far it affects the sight, or may hereafter impair the health of the girl, cannot be well ascertained. Being matter of opinion, it must be more or less uncertain. If the bony substance protruding into the socket of the eye-ball, continues to grow, it may be attended with melancholy consequences. As it is, it is rather a matter of medical conjecture and speculation.

Under these circumstances, is the remuneration so excessive as to make it obligatory upon this Court to control the discretion, both of the jury and of the Court below, and direct a new trial?

It has been argued that, inasmuch as there was fault on both sides, that the misconduct of the plaintiff should mitigate the damages; and, at first, I was inclined to adopt this suggestion. In a proper case, I am inclined to think the principle is a correct one. But is it clear that there was culpability on the part of the plaintiff? If so, in what did it consist? It is not very apparent. To talk about inexcusable negligence on the part of June, the driver, or extraordinary carelessness, is to falsify the truth of this tragedy. At least, was not this a case where it was peculiarly the province of the jury, to compare and weigh all the facts, and come to a conclusion, not by any artificial rules, but by the ordinary principles of reasoning?

But how stands the question as it respects the colliding train?

In the first place, approaching a crossing as it was, was it not the obvious, as well as the legal, duty of the servants of the company, to have checked their train at once, so as to have it under their control, in anticipation of the possibility even of difficulties? But waiving this, and conceding all that they claim on the other side, when they first saw the carriage so near the road, admitting it had halted, could they have fulfilled the requirements of the most ordinary care, without holding up at once, to prevent mischief? Could they have known that the driver would not stir, but endeavor to maintain his position, it was great imprudence, to say nothing worse of it, to have rushed forward the engine, regardless of results. From the effects of this conduct, and in this view of the case, they can never escape. Adopting their own version of the affair, they put the persons in the carriage in imminent danger, and did nothing whatever to contribute to their safety, or facilitate their escape.

But this is not all. After the collision occurred, they ran on two hundred and seventy yards, without taking up, with the vehicle and its victims thumping on the rail, when it is in proof by the lamented Foote, that they could have brought the train to a dead stand at the distance of one hundred and fifty yards! For they were ascending an up-grade of thirty-seven feet to the mile, as testified to by Col. Whittle and others! And when and where the damage to this family was done, does not appear; possibly, the whole of it during the last one hundred and twenty yards, unnecessarily consumed in arresting the train.

We will not believe this catastrophe was wantonly perpetrated. Humanity forbids it. The engineer, conductor, and all, were paralyzed at the appalling spectacle, the magnitude of the mischief they had inflicted. If they decline accepting this explanation, or apology, all I can say is, they have failed to furnish any other, or better.

We return to the main point. Is this verdict so large as to demand of this Court, in the exercise of its supervisory power, to control the discretion of the Circuit Judge, and send it back for the consideration of a *third* jury?

There is, as I conceive, a legal principle involved in this case, which should have much to do in deciding this question. It is plain, that from the reckless conduct of the servants of the company, Mrs. Winn was placed in a state of positive and palpable peril. Had the driver stood still, the party might have escaped unhurt. But might he not have reasonably concluded, that he might be incapable of managing his mules? He had to adopt the alternatives, of crossing the road, risking an upset by turning shortly and suddenly round, or remaining still, at certain peril. He could not have anticipated the stubbornness of the mules. Suppose he acted unwisely, and thereby unintentionally contributed to the sad misfortune, ought the consequences to be visited upon the sufferers? We hold not, unless the driver's conduct resulted from a rash apprehension of danger, which did not exist, and the injury can be traced or attributed to this miscalculation. And we recently recognized this doctrine, in the case of *Mrs. Polk, adm'x, &c. against the South-Western Railroad Company,* not yet reported. The Books are full of it.

While, then, we reassert the right of the Court to interfere for the relief of a party against a despotic verdict, in cases of *tort,* believing as we do, that it is absolutely necessary for the sound administration of justice; still, a Court should be cautious in setting aside a verdict, merely for excess. It is not enough that it be, in our opinion, too high. We cannot rightfully substitute our judgment for that of the jury. In this case, the party most grievously injured, has been kept out of the compensation to which she has been entitled since 1851. Heavy expenses have been incurred to prosecute this litigation. Two special juries have found the same sum. Is it so "outrageously excessive," in the language of some of the authorities, as to force the conviction, that the jury have been actuated by improper influences, passion, partiality, prejudice or corruption? Does the verdict strike every body so at the first blush?

Had I been on the jury, I might have preferred a different admeasurement of damages; and yet, I do not hesitate to say, that had the child been my daughter, I would not accept the money for the injury.

Judgment affirmed.

McDonald J. concurring.—

The only point of disagreement among the members of the Court in regard to the judgment rendered in this case, is on the ground taken in the motion, that the damages found by the jury are excessive. The jury, on the trial, found all facts in favor of the plaintiff in the Court below, to entitle her to damages. There is no complaint that the principles of law, applicable to the cause, were not fully placed before the jury on the trial by the presiding Judge, and fairly explained to them. Those principles were lucidly laid down in this case when before this Court at Macon, January Term, 1858. *19th Ga.* 440. The jury having determined the facts upon which the plaintiff was entitled to damages in her favor, it became their duty to assess the damages. They did so, and found a verdict for seven thousand dollars. I shall confine what I have to say to the single ground of the excessiveness of the damages. I am not called to determine whether I should have rendered the verdict for the amount of damages given, if I had been of the jury who tried the cause. It is scarcely possible to find any two men, whose minds at the first impression would arrive at the same conclusion in such a case. There are no fixed criteria by which a calculation can be made.

The verdict must be the result, partly, of calculation upon expenses actually incurred, loss of time, the nature of the injury, as it may disable the plaintiff temporarily or permanently, from pursuing a profitable or necessary employment, estimating the value of that employment; and partly of the opinion or judgment of the jury, of the damages to which the plaintiff may be entitled, for the endurance of the bodily pain and suffering, the injury inflicted, its permanent or temporary effect upon her health; its liability to produce other diseases, and render it necessary to employ, for life or other shorter period, attendants necessary to her existence or comfort, which would not have been necessary but for the injury. It is the province of the jury to do all these things, and it is only when it is done in a manner to produce the impression on the judicial mind that their conduct must have been the result of prejudice, passion, partiality or corruption, that the Court can interfere by awarding a new trial on the ground merely that the damages assessed are excessive.

The authorities say that the damages ought not to be

Benning J. dissenting.—

I differ with the Court on one point in this case. I think, that the damages were excessive; the Court thinks, that they were not.

Mrs. Wynn, the mother of the child suing, gives the following account of the hurts received by the child. "The skull of plaintiff was badly fractured, considering that she is yet alive. Her body was bruised nearly black. Her skull was broken in, just above and behind her left eye. Her left eye has sunk away, in consequence of the injury on the head. She cannot see with her left eye now, as much as she could six months ago. It is more sunken, is apparently smaller, and her mind is not as good as it was last year. And I know of no cause to attribute the loss of sight and memory to, but the fracture on her skull. Above, and in front of, the dent made on her head, immediately above the eye, a hard bony substance seems to be forming, and grows continually. It is larger now than last year, and larger than a partridge egg. She is disfigured for life; and that disfiguration increases, and her growth is retarded."

The hurts were received in 1851, and this account of them, was given in 1857, six years afterwards. At the time of the hurts, the child was six years old.

This, the mother's account of the hurts, makes them out worse, than any other account does.

Dr. Burney, swearing when the child had become twelve years old, says; "I have not detected any injury to her mind, since the accident. Have seen her very often." "I think the eye has been injured, but I don't know that the pupil of the eye has been injured, except as it keeps out the rays of light. I am of the opinion, that it has remained stationary, since I first saw it. The tendency of nature, I should think, would be to improvement. But the disfiguration is very apparent, and easy to be seen at this time. It could be seen across this room, (fifty feet,) by any person whose attention was called to it." "I think the diminished size of the eye, the greatest deformity. It is more of a deformity than the bump, I think." "The books all say, that such wounds on the head, make a person more subject to epilepsy, paralysis, and neuralgia. I think the damage dimishes as she grows older. I think she is more subject to nervous diseases."

Two other physicians, Drs. Hammond, and Nottingham, substantially confirmed this account of Dr. Burney's.

The child had never had "epilepsy," or any other disease resulting from the hurts.

For these hurts pure and simple, the jury gave the child $7,000 in damages. The jury did not take into the account the physicians' bills; or, any other special expense; or, the loss of time. The physicians' bills were paid by the Railroad Company; it does not appear, that there was any other special expense; the time of a child six years old, is worth nothing. None of these things, then, went to swell the verdict.

The child's promise of capacity or ability, for usefulness, was not impaired at all, or if, at all, only, in a slight degree. Six years has elapsed and no ill effects to mind or body, had developed themselves, the three physicians being the judges, In six years, a child of six, "out grows" such hurts; at least, we may say so with much confidence, if during all that time, no ill effect of the hurt shows itself. True, the physicians thought, that there was an increased susceptibility to nervous diseases, and that this had not entirely vanished, although it was constantly vanishing.

There was, then, little or no depreciation in the child's promise of usefulness, of ability to serve itself and others, ability to exert its rights and perform its duties. Consequently, there could be. from this source, little or no accession to the volume of the verdict.

There was no element of shame or mortification. It was not a case of seduction, or of spitting in the face, or of any such degrading injury. It was a case of accident, not even a case of malice.

What particulars then were there out of which, to make the amount of the verdict? I see but two. 1st. The pain and suffering undergone by the child; 2d, and the deformity of the head and eye—attended, perhaps, by a slight impairing of the power of vision.

And is it true, that this last ought so be counted? Is there any law which gives damages, for the impairing of mere good looks? But say that there is.

There were these two particulars, then, out of which, to make the amount of the verdict. Could so great an amount as that of the verdict, $7,000, be rightly made out of these two particulars? I cannot think so.

What is the criterion of damages? Compensation—a restoration of the injured party, to the condition which he was in before the injury. This pays his debt; and it cannot be, that he can have a right to more than his debt.

What then is compensation? It is certainly true, that there are many cases in which, it is difficult to say what would be compensation; but there are some in which, it is not difficult. I mention one. Suppose the wounds to be such, as to render the injured party useless—unable to do any work; and that by his work, he had been making $350 per year, before the injuries. Now paying him an equivalent for his lost ability to work, and paying the expenses of healing him, and paying him something for the pain he suffered, would be compensation. And $350 per year, paid to him, for his life, would be ample pay for the first, and the third, of these items, considering the accidents to which, the ability to labor is exposed, and, the certainty, that that ability diminishes to a point, with the diminishing years of life. It would be more than is generally paid; more probably than the cases warrant. "In one case, Parke B. said: It would be most unjust, if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmos amounts which they think an equivalent for the mischief done. Scarcely any sum could compensate a laboring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life." *Wayne on Dam.*, 264, citing *Armsworth vs. South Eastern Railway Co.*, 11 *Jur.* 760.

We shall, at least, then, be safe in saying, that $350 per year, for the man's life, would be compensation to him, for his whole injury—the expenses of healing his wounds, excepted.

What the man, then, would be entitled to recover in damages, would be no greater a sum, than one which would produce an annuity of $350, for his life. And that would be a sum considerably less than $5,000, and varying, as the man was older or younger; $5,000, being a sum which, at seven per cent. per annum, would raise an annuity of $350, *perpetually.*

Thus, then, we have an idea of what would be compensation in this supposed case in which, the injury is so great, as to deprive the party of all ability to work.

Of course, it must follow, that a less sum would be a compensation to him, in the case in which, the injury was less.

Now, let us argue from this supposed case, to the actual case. Let us ask what would have been the amount required, as a compensation to this child, had her injuries been so great, that they would have rendered her useless for life—unable to do any sort of work or business? And we may safely answer, that it would not have been, a greater amount, than one sufficient to balance the value of her lost ability for work and business; to pay the expenses of healing the injuries; to pay something, for the pain and suffering resulting from the injuries, and, something for the disfiguration of face.

What would be the annual value of this lost ability for work and business? $350? That is more, I think, than such ability of women in the average, is rated at; more than it usually commands. Say then $350.

Then $350, per year for the child's life, would be equal to the value of her lost ability for work and labor for usefulness. It would be more, a good deal more; for during both the earlier, and the later, years of her life, this ability would not be worth as much as $350 per year, because during the earlier, she would be too young, and during the later, too old. The excess would, I think, we may safely say, be sufficient to pay the something due for the pain resulting from the injuries, and the something due for the disfiguration of face. We need say nothing of the expenses of healing the injuries, as there were no such expenses in this, the actual case.

What sum would produce this annuity of $350, for her life? A sum of $5,000, would more than do it. That sum at seven per cent. per annum would produce an annuity of $350, *in perpetuity*. But say $5,000.

Then, $5,000 would be a sum sufficient to compensate her, for the whole injury—even supposing it, an injury so great as entirely to have destroyed her capacity for every kind of work or business.

$7,000, therefore, would have been a sum too great, by at least, $2,000, even if the case had been this extreme one of destroyed capacity for everything useful.

But, it was not this extreme one. Her capacity for usefulness, was hardly impaired at all. In a degree how much greater, then, must $7,000 have been too large. Yet the jury gave her $7,000.

The pain suffered by the child, was, I have no doubt, very great; the disfiguration of her face, was, certainly, considerable, but yet, not so great as to shock the beholder. I could, therefore, sanction the allowance to her of a liberal sum to pay for the two things; but I cannot sanction an allowance of $7,000. Suppose she had lost the eye; or, had lost both arms; or, both legs; what would the $7,000 have had to be raised to? $15,000?—$50,000? Surely not less than these sums. Now, is a verdict fraught with such results as these, to be sanctioned? I think not. Sensibility, if admissible at all in a court house, is surely when admitted, to be kept within some bounds. I think, that the verdict was much too large.

Did not the jury have the right to give something, as "punitive" damages? In my opinion, they did not. The doctrine of "punitive" damages, is one for which I cannot see any warrant in the law. Suppose it true, that the injury is such, that a part of it *is* to the public, the other part being to the injured man, does it follow, that he is entitled to the compensation due to the public's part? Does it follow, that he is entitled to anything, but the compensation due to his own part? Has he the power to release the compensation due to the public's part? Surely not: but if he has not, ought the injuring party to be subject to the payment of this compensation twice; once, to the injured party, and once to the public. What is it to the injured party, if the public is never paid?

In respect to this doctrine of the punitive damages, I think that Greenleaf is right and Sedgewick wrong. See *Sedde. Meas. Dam. App. No.* 1, *and No.* 2.

But surely, the only cases in which punitive damages are admissible, if admissible in any, must be, cases bearing some analogy to criminal cases; to cases to make which, there must "be, an union, or joint operation of act and intention, or criminal negligence." And what analogy does this case bear to a criminal case. In this case, a corporation is the party sued. And what has the corporation done of a criminal nature. It appointed a board of directors; a board consisting, as far as appears, of prudent and circumspect men; and this board appointed a president and other officers, also, prudent and circumspect men, as far as appears; and these appointed the sub-officers, who were in charge of the train, when the accident happened. Now, surely, it would be the merest extravagance, to say, that this accident was the result of "*intention*," or "*criminal* negligence," in the corporation. Whilst, therefore, it may be quite true, that the corporation is liable for the negligence of these, its sub-officers, I do not see how it can be liable, in *punitive* damages.

Hitherto, I have been going on the assumption, that the whole negligence which caused the accident, was in the corporation, (by its agents,) and, that no part of it, was in the child, or (the same thing,) in her mother; and, even on that assumption, the conclusion to which I have come, is, as I have said, that the verdict ought to have been for some amount much smaller than $7,000; but if that assumption was not true; if the negligence which produced the accident, was shared in by the child too, (by her mother,) then, I think, that this smaller amount ought itself, to be reduced; ought to be reduced in proportion to this, the child's share, of the negligence.

Now, the evidence, as I think, shows the accident to have been the result of a negligence on both sides; a negligence that was less on the side of the child, but still, that was on her side too.

I will refer to the evidence.

Mrs. Wynn, the mother of the child, says, "I saw and heard the engine and cars before they reached the crossing, and I directed the driver to stop until they passed; but he said he thought he could cross first, and attempted to do so."

"The driver drove on until the mules hitched to the carriage, got on the track of the road and then stopped. The driver whipped them to get them off, but they stood still, looking in the direction of the engine, when it struck the carriage."

"If the driver had followed my directions, the injury would have been avoided. He did not stop at all, but said when I directed him to stop, that he would cross before the cars, and hastened on to do so."

This is what Mrs. Wynn said, when examined the first time, which was, in 1853; when examined the second time, which was, in 1857, she said; "I do not think the driver could have safely driven otherwise, than he tried to do. He might have stopped the mules, for they did not then see the engine."

"Whose fault it was, I leave for others to determine. I have stated all the truths and facts as nearly as I can. I did think, for a long time, the negro was wrong, until I saw the place, and examined it, afterwards."

"As soon as the engine was discovered coming, the driver hurried up the mules, and used every exertion to effect a crossing, by whipping and encouraging them, but they refus- to move as soon as they got on the crossing, and turned their heads, looking at the engine."

"The driver had time enough to clear the crossing, and move out of the way of the engine, had not the mules baulked."

"I called on the driver, to stop when within twenty feet of the crossing, but he urged the mules on, and said it would not do to stop where we were; that there was no way to get out of harm, but by crossing; that, the mules were not used to cars."

"When I first saw the engine coming, the mules and carriage were going along the public highway, from Macon to Forsyth, and where, the public and the said road run nearly parallel, but converge, hemmed in by a fence off on the left, which runs up to the point of intersection of the highway and Railroad; and, by the Railroad on the right, (the carriage had no chance to turn, right or left.) When in this position about twenty feet from the Railroad, as before stated, I saw the engine about two hundred yards off, coming from Forsyth to Macon, almost fronting us."

It thus appears, that when the carriage was twenty feet from the crossing, Mrs. Wynn, and the driver saw the engine approaching two hundred yards off. What then, at this time, was the [illegible] of prudence to them? To go on, or, not to go on? Not to go on, I think. Prudence would say, I think, that the driver should stop and turn back, if turning back was practicable; if it was not, that he should stop, dismount from his seat, go to the head of his mules, and take them by their bridles. And Mrs. Wynn herself, doubtless, thought so too, at the time, and "for a long time" afterwards, because; she told the driver "to stop;" she "did think for a long time," that he was "wrong." True, on visiting the spot "a long time" afterwards, she changed her mind, and came to the conclusion, that the driver in going on, was not "wrong." But still, I think the first opinion entitled to more respect, than the second, for, the first was formed, on perception, the second, on memory; a memory that had had "a long time," to fade in; and, then, when the first was formed, no reasons existed, to bias her judgment, but when the second was formed, powerful reasons to bias it existed.

If we say, that there existed ground as to the driver, for a reasonable expectation, that he would be able to cross the track before the engine came up, and that it was not at all imprudent in him to act on such reasonable expectation, and attempt to cross, we have equally to say, that there existed, as to the runner of the engine, this same ground, and that it was, in like manner, not at all imprudent in him to act on such reasonable expectation, and delay to check the engine's speed, till too late. If we say this, however, we make the case, one free from negligence on either side.

I think, then, that some of the negligence, was on the side of the child.

More of the negligence, I also think, was on the side of the corporation; I shall not stop to state my reasons for this opinion.

I assume it then, as true, that negligence existed on both sides, and therefore, that a negligence on both sides, caused the acccident and loss; the share of the negligence on the one side, causing a part of the accident and loss, proportioned to the quantity of that share; the share of the negligence on the other side, causing a part of the accident and loss, proportioned to the quantity of that share.

This assumed, as true, the first question will be; whether the plaintiff, (the child) was entitled to recover at all; the next, whether, if entitled to recover at all, she was entitled to recover, for the *whole* loss, or, only, for the *part* not resulting from her own negligence, viz: the part resulting from the negligence of. the corporation. I address myself to these questions.

Of all the maxims of the law, one of the most general, is, that for every wrong, there is a remedy.

Now, if I do what hurts another, it will be a wrong to him, even, although, he himself be doing the very same thing. If I beat a man with a stick, it will be a wrong to him, even although he himself be beating himself with a stick. So, if I am negligent and my negligence goes to produce an accident to his loss, it is a wrong to him, although, it may be true, that he, also, is negligent, and that his negligence also, goes to produce the same accident.

It would seem to result, from this maxim, then that the child, through herself, not free from negligence, would have a right of action, and be entitled to recover something.

With this result, agree, I think, the decisions of this Court; decisions growing out of this same accident. In *Macon and Western Railroad Co. vs. Davis,* (18 *Ga.* 686,) the language of the Court is, "it ought to be left to the jury to say, whether notwithstanding the imprudence of the plaintiff's servant, the defendant, could not, in the exercise of reasonable diligence, have prevented the collision." This is as much as to say, that the plaintiff, even though himself, "imprudent," (negligent,) might recover, if the defendant could, by the exercise of reasonable diligence, have prevented the collision.

In the present case, when it was up before, the Court recognize the same position, saying, "we went further, and held, that notwithstanding the plaintiff was not free from fault, still if the defendants in the exercise of due care, could have prevented the injury, they would be responsible. We adhere to that decision." (19 *Ga.* 442.)

With these two decisions, agree, two English decisions, as far as they go. The first is, that in *Smith vs. Dobson*, (3 *Mann & Grang.* 59.) In that case, these were the facts: While the plaintiff's "barge was crossing the river, the defendant's steamboat, the Water Lily, passing rapidly up the river, created a swell, which filled and sunk the barge, occasioning a loss of fifty tons of coal, of the value of £80" "The plaintiff's barge was insufficiently manned, having on board only one man and a boy, the former of whom was in liquor;" "the barge was overloaded, and also badly trimmed, being seven inches deeper in the water on one side than the other."

"The jury returned a verdict for the plaintiffs, the foreman saying, "We give only £20 damages against the defendants, inasmuch as we think, the blame is not attributable to them alone, and because the barge was not properly manned."

The defendants moved for leave to enter a verdict for them, or, for a new trial. The motion was overruled.

Now, here there was much negligence on the side of the plaintiff, and yet the verdict for the plaintiff was sustained, it being a verdict however, which was for only *one-fourth* of the plaintiff's loss; a fact which will be of use on the second question.

Very similar to this, is the other English case, which is that of *Raisen vs. Mitchell and others*, 9 *Carr and Payne* 613.

There are still other English cases which, I think, do not differ from these two, in any thing substantial; as *Butterfield vs. Forrester*, (11 *East.* 60;) *Bridge vs. The Grand Junction Railway Company.* (3 *M. & W.* 244.)

And, in the Admiralty Courts, the rule, where there has been blame on both sides, is, "that the loss must be apportioned between them." *Ang. on Carr., sec.* 642.

In answer then to the first question, whether the plaintiff in the present case, though herself guilty of some negligence, was entitled to recover at all, we may say, I think, that she was.

Assuming, then, that she was entitled to recover something; the second question comes up, which is; was she entitled to recover an equivalent for the *whole* loss, or only an equivalent for the *part of the loss resulting from the negligence of the defendant.*

"Damages." *Damna* in the common law, hath a special signification for the recompence that is given by the jury to the plaintiff, or defendant," (demandant,) "for the wrong the defendant hath done unto him." 2 *Coke. Litt.* 257, *a.*

According to this definition, the defendant is liable in damages, only for the wrong *he* has done. And that a defendant's liability does not extend beyond this, would, indeed, seem to be, a self-evident proposition.

Now, in the present case, the "wrong" which "the defendant" did, to the plaintiff, consisted in the defendant's *share*, in the common negligence.

It must follow, then, by this definition of Coke's, that the plaintiff would be entitled to recover of the defendant, damages, only for this, the defendant's *share*, in the negligence; that is, would be entitled to recover of the defendant, damages, only sufficient to pay for the part of the loss, due to the defendant's share in the negligence.

The answer to the question, then, if, to be governed, by such a fundamental principle, as this definition of Coke's, would seem to be, that the plaintiff, if herself, guilty of any part of the negligence from which the loss resulted, would not be entitled to recover of the defendant, damages for the whole loss, but only for that part of it, which was due to the defendant's share in the negligence. Say the whole negligence was as, four, (which would make the whole loss also, as four,) and, that the plaintiff's part of the negligence was as one, and, the defendants part, as three; then, the plaintiff, would be entitled to recover of the defendant, damages equal, not to the whole four parts of the loss, but, to only three parts of the loss; the fourth, part of the loss, due to her own part of the negligence, she would have to bear herself.

This then is the result from the definition of damages. And what is there against it, in decisions. The decisions in the above cited cases of *Smith vs. Dobson*, and *Raisen vs. Mitchell*, are, certainly, as far as they go, in favor of the result.

In the former of these two cases, the loss amounted to £80. The jury gave £20 in damages; that is, they gave one-fourth only of the loss; and they expressly put their verdict, on the ground, that "the blame" was "not attributable to the defendants alone."

This verdict was sustained; and the natural and obvious ground to sustain it on, is, that on which it was put by the jury, viz: That the blame was not attributable to the defendants alone. And this is the ground on which, two of the Judges, (*Tindal C. J. and Erskine J.*,) it seems, did put their opinion sustaining the verdict.

In the latter of the two cases, (also a case of collision of vessels,) the loss was at least £543 13s. The jury returned a verdict for only £250. "Tindal C. J. asked the jury how they made up their verdict. "The foreman answered, there were faults on both sides." "Tindal, C. J., then you have considered the whole matter." "The foreman replied in the affirmative." "*R. V. Richards*, submitted to his Lordship, that the facts which the foreman of the jury had stated entitled the defendant to a verdict."

"Tindal, C. J.—No. There may be faults to a certain extent."

In this case, the sum found by the jury, was not quite equal to one half of the loss. And, as in the other case, it was found, expressly on the ground, that "there were faults on both sides;" and the finding was sustained; and, seemingly, on the same ground.

The rule in Admiralty, as stated by Lord Stovell, is; where both parties are to blame, or where there has been want of due diligence or skill on both sides; in such case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them." *Ang. on Car., sec.* 642. "*Apportioned*" would seem to imply, that the part of the loss to be borne by either, is to be in *proportion*, to his part of the fault. If this be what was meant, then this rule is in precise accordance with what was above deduced from Coke's rule; and with the verdicts in the two cases just noticed; if what was meant, was, that in the case put, the loss was to be divided *equally* between the parties, then the rule is such, that it will be in accordance with that deduction, only in cases in which, the parties share equally in the fault; and, in other cases, it will merely, more or less approach accordance with the deduction.

From what has been said, I think, I am justified in concluding, that if there is, in cases like the present, negligence on both sides, the plaintiff is not entitled to recover damages for the *whole loss*, but only for the *part* of the loss, *which results from the defendant's share* in the negligence; in other words, that the plaintiff is entitled to recover, only such an amount of damages, as shall bear to the whole loss, the same proportion which, the defendant's share in the negligence, bears to the whole negligence.

The present, as I have shown, I think, is a case of negligence on both sides, though of a negligence less on the side of the plaintiff, than on the side of the defendant. If it is, then supposing me right in the above conclusion, the plaintiff was not entitled to recover of the defendant, damages equal to the whole loss, but, only, damages equal to the part of the loss, which resulted from the defendant's share in the negligence; that is to say, if the defendant's share in the negligence was, three-fourths, then the plaintiff was entitled to recover of the defendant, only a sum equal to three-fourths of the loss.

And this is my answer to the second question.

What effect is this answer with the other, to have on my opinion as to the excessiveness of the verdict? I will state.

Even on the hypothesis, that the child, (or its mother,) was free from fault, the conclusion, to which I came, was, that the verdict should have been of a less amount than it was. The child not being free from fault, it must follow from the answers to these two questions, that I consider even this less amount, to require reduction; a reduction proportioned to the child's share in the fault, or negligence. And so, I do.

As the case is, the plaintiff's share in the negligence, was *less*, than the defendant's. Suppose the case, had been, that it was as great, or greater, would the same principles apply in that case, and give her the right to recover; and, to recover an amount proportioned to the defendant's share in the negligence? Why not? Even in that case, some portion of the loss, would be due to the defendant's part of the negligence; and for that portion, Coke's definition would require the defendant to recompense her. So, would the two English cases; for they were cases in which, the verdicts were for less than half the loss, and were so, because the jury thought, that the defendant's share of the negligence, was less than half the negligence, in other words, thought that the plaintiff's share in the negligence, was more than half of the negligence. In Admiralty, the loss is apportioned in all cases, and therefore, in cases in which, the plaintiff's part of the blame, is as great as the defendant's or greater. The difference between the two classes of cases; the class in which the plaintiff's share of the fault is the less, and the class in which it is the greater, or as great, is one, not of kind, but merely of degree. Consequently, whatever rule or principle, is true of the one class, ought, equally, to be true of the other. And, in the abstract, what has more to commend it, than this; every part of the cause of a loss, ought to bear is part of the loss; or, more briefly, the fault ought to bear the loss.

The principle, that the fault ought to bear the loss would require, that in cases of negligence in both parties, apportionment ought to take place, even when the loss falls on both parties. And in Admiralty it does; but, perhaps, with some limitation.

And what objection is there to this principle? I see none. If denying an action, in these cases, to the sufferer, is a proper punishment, to him, it is an improper reward, to the other party; if denying an action to the sufferer, will be a discouragement to future negligence in him, it will be an encouragement to future negligence in the other party.

But surely there can be no objection to this principle, in the case in which the plaintiff is not one of the guilty parties, but merely a person who occupies the relation of passenger or bailor of goods, to one of those parties. Surely he ought to be allowed to sue the other guilty party, and make him respond in proportion to his guilt. Yet there are some cases, that refuse even him the permission. See *Ang. on Car. sec.* 636.

My conclusion, then, is, that the damages were excessive; 1st. That they were over proportioned to the wounds or injuries, and, therefore, that they should suffer one reduction on that account; 2dly. That they were given to a party whose own negligence had a share in producing the wounds or injuries, and, therefore, that they should suffer a further reduction on that account.

JAMES REVEL, plaintiff in error, vs. THE STATE OF GEORGIA. defendant in error.

[1.] When the Superior Court is opened and organized, at the regular time appointed by law for holding the same, it is competent for the Judge to adjourn over to a future day or week, that he may see fit.

[2.] 1st. A continuance will not be granted in a criminal case, on account of the excited state of the public mind, after five months have elapsed since the crime was committed. 2d. Continuances are still within the sound discretion of the Court, and do not fall under the New Trial Act of 1853. 3d. Where the accused has ample time after his arrest, to make preparation for his trial, the *recent* finding of the bill of indictment by the grand jury, is no excuse for postponing the cause; especially, where the offence for which the prisoner is to be prosecuted is well known to him—the only question being as to the grade of the homicide which he has committed. 4th. The fact that the defendant is imprisoned, is no reason why he should not make preparation for his defence. 5th. If it appear to the Court that the testimony of an absent witness is immaterial, a continuance will not be granted.

[3.] When former panels of the jury are rejected, by reason of challenges to the polls, the Court will summon new panels, until an impartial jury can be obtained to try the cause.

The Act of 1856, regulating the mode of selecting juries in criminal cases, does not repeal all other laws upon the same subject, but such only as are in conflict with it.

[4.] Where the prisoner, after killing the deceased, effects his escape, and to enable him to do so, takes the life of another person, and attempts to shoot others, these acts of violence may be given in evidence on the trial for murder, as well to manifest the deep self-consciousness of the accused of his guilt, as to characterize the *quo animo* with which the deed was perpetrated.

[5.] To constitute murder, it is not necessary that the prisoner should entertain personal ill-will toward the deceased.

[6.] A verdict is not objectionable for irregularity, for finding the defendant guilty of murder, instead of guilty generally.

[7.] The jury being made the judges both of the law and the facts in criminal cases, their verdict will not be disturbed unless it be clear that the defendant has been wrongfully convicted.

[8.] If the jail of the county, where a conviction is had in a criminal case, is insecure, it is competent for the Court to order the prisoner to be committed to the jail of another county for safe keeping.

NOTE.—Would it not be well to direct all capital felons to be kept in the Penitentiary, especially after conviction? And also, to be executed there in the presence of the convicts. Quere?

Murder, in Crawford Superior Court. Tried before Judge LAMAR, at March Term, 1858.

The facts of this case are stated in the opinion of the Court.

HUNTER; and LOCHRANE, for plaintiff in error.

SOL. GEN.; and S. HALL, for the State.

By the Court.—Lumpkin J. delivering the opinion.

[1.] Was the Court right in overruling the plea to the jurisdiction of the Court in this case?

The regular Terms of Crawford Superior Court are on the first Mondays in March and September. To accommodate the bar, who were in attendance on the Supreme Court at Macon, Judge Lamar determined to adjourn over Crawford Court. He first acted under the statute of 1823, *(Cobb,* 460,*)* as amended in 1837, *(Cobb,* 461,*)* that is, through the agency of the Clerk. But reflecting that he could not order an adjournment through this officer, except on account of the sickness of himself or his family, or some other Providential cause, which cause the law required to be expressed in the order of adjournment, he attended in person, at the regular Term for holding the Court; opened the Court; offered to hear motions, &c., and then adjourned over the Court till the Monday following. I confess I am unable to comprehend the objection to the regularity of this proceeding.

If the Court that tried the prisoner during the second week was not legally constituted, then no adjourned Court ever held in this State was. The Courts have the power, and they have uniformly and universally exercised it for three score years, when once organized, of adjourning from day to day, or from week to week, even passing over intervening sessions in other counties, until they have completed the business of the Term; and we know of no limitation or restriction upon this right. The Acts cited have no application to a Court which has been properly organized, and which has entered upon the duties of the Term.

[2.] Ought the continuance to have been allowed?

The showing is made up of several distinct grounds. As to the public excitement, there is nothing in that. The offence had been committed five months before the prisoner was put upon his trial. Surely, this was sufficient time for the mind of the comunity to become tranquilized, if it ever was unduly excited. It is manifest, that such indeed was the fact. Seven impartial jurors were selected and sworn out of the first panel of forty-eight; and the remaining five out of the next. And it does not appear that the whole of this second panel was exhausted. No public passion, which would prevent a fair trial, could have prevailed under such circumstances. The prisoner was mistaken if he thought so.

And then, as to his want of opportunity to prepare for his defence, by reason of the recent finding of the bill; that does not meet the truth of the case. The accused had been arrested for this offence, and committed to jail five months before. What prevented him from setting about at once to hunt up his testimony, if he had any? He might have applied for compulsory process to coerce the attendance of witnesses. If this had been denied, his application would have seemed more reasonable. The transaction was not complicated, involving any mystery to be unraveled; there were but few persons present when the homicide was committed. They were doubtless all known to the defendant. Most, if not all of them, have been examined on the trial. True, the accused could not anticipate with certainty, whether the grand jury would find a true bill for murder or manslaughter. He could but foresee, however, that the same proof would be required in either event. Indeed, it would readily occur to him, that his main purpose would be to mitigate the crime from murder to manslaughter.

If the fact of his imprisonment hindered him from doing any thing for five months, how much better off would he be were the time prolonged. He would not have been bailed after the true bill for murder was found. One witness, Elizabeth Bundrick, was subpœnaed and did not attend. Was her testimony material, or even relevant? Whether Adams was killed by Revel, or died under the want of skill in the surgeon, in attempting to extract the ball from the wound, is a matter of little or no consequence in the present issue. Revel admits, in his affidavit for a continuance, that he shot both Adams and Hammock. True, he says it was in self-defence. He does not dispute intending to kill Adams. If he was not justifiable, then, he was guilty of an assault with intent to kill Adams. It follows, therefore, that the degree of criminality between the two cases, as to Adams, was too slight to make any perceptible difference on the trial for killing Hammock. And that, consequently, the evidence of Mrs. Bundrick was quite immaterial. It could not have affected the verdict of the jury.

[3.] The next objection is, as to the mode of selecting the jury.

The first panel of forty-eight was made up by adding to the twenty-four jurors in attendance upon the Court, a like number of talesmen, to which no exception was taken. Seven jurors having been selected and sworn out of this panel, forty-eight more were summoned and presented to the prisoner who, through his counsel, objected to this second panel, on the ground that it was not authorized by the Act of 1856, regulating the manner of empanneling a jury in a criminal case.

It is true, that the 2d, 3d, 4th, 5th, 6th and 7th sections of that Act refer only to new panels of forty-eight, where the former have been set aside by challenges to the array; and no part of the Act makes provision, in so many words, for summoning additional panels, where the former have been exhausted by challenges to the *polls*. Still, it may be inferred from several expressions in the Act, that the Legislature did not intend to change the old law in this respect. In section 10 it is said, that the Court shall proceed to apply the tests furnished by the Act to secure an impartial jury, "until a jury be empanneled to try the accused." Now, this requirement is impracticable, unless new panels are summoned. Again, in the 11th section, "until a jury is empanneled to try said case". *Pamphlet Acts*, 229, 230.

But suppose the Act was defective in this particular, it does not, like the attachment and garnishment law of that session, repeal most unwisely all other laws in the State upon the same subject; but such only as are in conflict with it. Of course, then, the old law would supply the remedy.

[4.] The Solicitor General proposed proving, that cotemporaneously with the killing of Hammock, prisoner shot one Adams, who died of the wound; and snapped his pistol at two other persons. to-wit: Smithson and Clay. Counsel for the accused objected to this testimony on the ground of irrelevancy. It was admitted that prosecutions were pending against Revel for each of these other offences. The merits of this case are materially involved in this exception.

Without adverting to all the facts contained in this record, it is sufficient to say, that these four men, Hammock and Adams, Smithson and Clay, were all at Revel's grocery on that occasion. The parties had been engaged in shooting for beef. There was some political animosity between them. And most, if not all of them, were excited by liquor. Hammock had, a short while before the killing, insulted Revel. But being put right as to the mistake under which he labored, he made prompt and ample apology, which Revel accepted as satisfactory. They conversed together in private. While Hammock was outside of the door, Revel, who was evidently in hot blood, peremptorily ordered Clay out of the house, threatening to shoot him. And from the testimony of Clay, this conduct was without provocation. Revel remarked that he had been insulted by a damned democrat, meaning Hammock, and that he intended to have revenge. Clay undertook to pacify him, and expressed the hope that there would be no difficulty. And for this, he was rudely thrust out of the house, with a hostile demonstration on the part of Revel. Clay left the house; and my interpretation of the evidence is, that Revel, with his revolver in his hand, seemed to be following. Clay met Hammock just outside the door, and for the purpose of defending himself against Revel, snatched Hammock's gun out of his hand, which was unloaded and without a cap. Hammock stepped into the room, and meeting Revel, raised his hands; but whether he put them upon Revel, the proof is not clear. He seemed to be intending to prevent rather than inflict an injury. His attitude is inconsistent with the idea of offering personal violence to Revel. The witnesses inclined to the belief that his hands were not upon Revel. Hammock, in this position, is shot down. Smithson, the constable of the district, orders the persons present not to permit Revel to escape; and he and they attempt to prevent it. He shoots down Adams, an unoffending person, and snaps at Smithson and Clay, and effects his escape. Are not the whole of these acts a part of the *res gestæ?* Ought they to be suppressed? Can they be separated? Flight has always been considered an admission of guilt. When culprits thus recklessly destroy human life, in order to get away, is not the confession of conscious guilt thereby greatly strengthened? We think so; and that in this aspect of it, at least, the testimony was admissible. Still more so, perhaps, as an exponent of the *quo animo* of the accused.

[5.] It is argued that the malice which constitutes murder, must be felt toward the individual killed. Is this true? Where a gun is fired at random into a crowd, and life is taken, malice, says the law, shall be implied; and so too shall it be, declares the code, where no considerable provocation is given, and where all the circumstances of the killing denote an abandoned and malignant heart. True, there had been provocation by opprobrious words, but atonement had been made and accepted. The threat proven by Clay, indicates too clearly, that it had not been forgotten or forgiven. And his subsequent conduct shows that the prisoner was determined to wash out the insult with the blood of the deceased. His whole demeanor on that occasion was domineering and dictatorial. He stood in no fear of personal injury. These cotemporaneous acts were, we repeat, rightly let in, to characterize the motives of the prisoner.

Counsel, claiming to be surprised by letting in this testimony renewed his application for a continuance, in order to procure the attendance of Mrs. Bundrick. We have already attempted to explain, that her testimony could have no appreciable effect upon the result of this case. It should have none; and the granting or refusing a continuance is still left to the discretion of the Court, and is not embraced in the new trial Act of 1853—an Act which we hope soon to see blotted from the statute book.

No complaint is made against the charge of the Court. The Judge gave the law as requested by defendant's counsel, and in the language of the request, with an addition about which there is no complaint.

The jury having returned a verdict of guilty, a motion for a new trial was made, on the grounds already reviewed, and others which we will briefly notice.

[6.] Exception was taken to the form of the verdict, namely: that it found the defendant guilty of murder instead of guilty only. This ground is very properly abandoned.

[7.] Because the verdict was contrary to law, contrary to evidence, and the charge of the Court.

The jury are made the judges of the law as well as of the facts, in criminal cases. Neither this nor any other Court should suffer a person to be deprived of his life, where his guilt is not fully established. Is this case so clear as to warrant, much more to demand the interference of this Court? We think not. On the contrary, we must say, the testimony authorizes the verdict. No justification is shown for killing Hammock. And the attempt to destroy the lives of three others at the same time, to make his escape, evinces much disregard of human life. It would not be too strong to say, much depravity on the part of the prisoner.

[8.] As to the exception to the order, directing Revel to be removed from Crawford to Jones county, for safe keeping. Suppose we were to reverse it, as surely we shall not, that would not entitle the accused to a new trial. I see from the newspapers, that since the trial, the jail in Crawford county has been burnt, and a man consumed in it. The prisoner cannot be sent back there. It may have been fortunate for him that he was not an inmate of that prison at the time.

Upon the whole, we feel constrained, after a careful examination of the law, as well as the evidence in this case, to affirm the judgment of the Court below.

Judgment affirmed.

NOTE.—Since this opinion was delivered, it is announced in the public press that Revel has escaped jail. Something must be done to secure the execution of the criminal laws. I have heretofore suggested the propriety of building circuit jails for the higher grade of criminals. Perhaps, a better plan would be to authorize them by law to be confined in the Penitentiary, at any rate, after conviction. In cases of capital felony, how would it do to have them executed there?

M. J. MORGAN, claimant, plaintiff in error, vs. SIMS & NANCE, defendants in error.

[1.] What a claimant says at the time the Sheriff levies on property, as belonging to another person, respecting that property, is *admissible* in evidence.

[2.] Evidence that the defendant in execution was in possession of property levied on and claimed by a third person, down to a short time before the Court, at which the judgment was obtained, on which the execution was issued, and had been for sometime, is sufficient to cast the *onus* on the claimant to show his title.

[3.] Property is bound from the *signing* of the judgment, and does not relate back to the first day of the term. The doctrine of relation does not apply so as to do a wrong, or lay a charge upon a person who is not a party.

Claim, from Sumter county, and motion for new trial. Tried before Judge ALLEN, at March Term, 1858.

Sims & Nance sued and obtained execution against the firm of Mims & Wadsworth, and the same was levied on "the house and lot lately occupied by defendants at Americus, the same being part of lot No. 1, in the 27th, also, the front of lot No. 2, in square letter H. in Americus, 75 feet more or less back, also, on that part of lot No. 1, in square H. in said town, on which is the grocery store lately occupied by Mims & Wadsworth, also, on the stock of goods, wares, &c., found in the dry goods store on lot 2, in letter H.; all levied on as the property of Mims."

Mitchell J. Morgan put in his claim to the property levied on, and on the trial of said claim, the jury rendered the following verdict:

"We find the middle or dry goods store, or the house lately occupied by Mims, with the lot on which it is situated, subject to this *fi. fa.*, with ten per cent damages; the other two lots levied on we find not subject to said *fi. fa.*" Whereupon, the claimant moved for a new trial on the following grounds:

1st. Because the Court erred in refusing to allow Wheeler, the plaintiff's witness, to answer the question, "if, at the time he testified as having seen defendant in the house, Jared Tomlinson and Mims did not both say the goods were Tomlinson's, or if Tomlinson did not give orders to the clerks, and they obeyed him."

2d. In refusing to dismiss the levy, on the ground that plaintiff had closed without removing the *onus.*

3d. In charging the jury, that the judgment, although not signed until the 19th February, commenced and related back to the first day of the Term.

4th. In charging the jury, that if they believed from the evidence, that the defendant was in possession on the first day of the Term of the Court at which the judgment was had, although the judgment was not signed until the 19th February; that its lien commenced from the first day of the

Term, and the *onus* was cast upon the claimant of showing title in himself.

5th. Because the verdict was contrary to evidence.

6th. Because the verdict was contrary to law.

7th. Because the verdict is uncertain, in not fixing the amount on which the damages are to be assessed.

8th. Because the verdict does not specify with sufficient legal distinctness, what portion of the property in dispute is subject.

Brief of evidence.

Plaintiff introduced the *fi. fa.*, and explained and accounted for the levy of personal property, and proved by Wheeler, that Mims had been in possession of the dry goods store house six or eight years, and up to the week before the February Term of the Superior Court; that on the first day of the Term, he went to the store house, as Sheriff, to levy on the goods in it, by virtue of a *fi. fa.* in his hands against Mims; Mims was in the back room, and Tomlinson came in; didn't see Mims exercise any acts of ownership, or authority at that time, over the goods or clerks. The week before Court, he had seen the clerks making an inventory of the goods. The back room where he saw Mims was a place of common resort. Tomlinson paid up the *fi. fa.* Witness went then to levy, and took control of it; next day the store was not opened, and was shut until witness broke it open on the 23d of February, 1852; did not know who had the key, and the control, after it was shut; Had seen Tomlinson open the door and go in; Mims left the country in two or three days after he went to levy the execution, and had not been back since to his knowledge; proved the value of the property, &c.

The Court refused the motion for new trial, and claimant excepts.

McCAY & HAWKINS; and WARREN, for plaintiff in error.

THOMAS C. SULLIVAN, for defendant in error.

By the Court.—McDONALD J. delivering the opinion.

[1.] My brothers Lumpkin and Benning are of opinion that the presiding Judge in the Court below, erred in rejecting the sayings of Tomlinson, at the time the Sheriff went to levy the executions. They consider all the sayings of Tomlinson as admissible in evidence, as part of the *res gestæ.* I think that the evidence of what he said, ought to have been confined to his orders to the clerks.

The plaintiff in execution was endeavoring to prove possession of the property by the defendant as evidence of his title. The stock of goods was levied on at that time. Mims, the defendant, and Tomlinson, the claimant, were both in the store at the time, and to determine whose was the title, it was necessary to show whose conduct gave evidence of ownership, and the claimant's orders to the clerk ought to have been received for what they were worth, for that purpose. The declarations of Tomlinson, in favor of his own title, whether in or out of possession, whether at the time of the levy or at other time, according to no rule of law, according to my view of the law, could be received to *support* his title. Whatever he may have said in *disparagement* of, or *qualifying* his title, would be admissible.

If it be admitted that Mims was in possession at the time, what he said in disparagement of his title was admissible, otherwise, not. But this testimony had reference to the stock of goods only, which was not found subject to the execution. It, perhaps, may have an indirect influence on the title to the lot.

[2.] We think the Court decided correctly on the motion to dismiss the levy, on the ground that the *onus* was not changed. On the week before the Court at which the judgment was obtained, the defendant was in possession of the property, and had been for six or eight years. The suit must have been pending, and the evidence was certainly sufficient to refer the question to the consideration of the jury, if the sale was made to hinder or delay creditors.

[3.] This is a contest between a creditor and a person claiming to be the *bona fide* purchaser of the property levied on, from the debtor. And the question here is as to the *lien of the judgment* on the property, and the time at which the lien attached. There is a difference as to the lien of a judgment against a purchaser, and the lien of judgments against judgment creditors. If the purchaser be not chargeable with fraud of any sort, he takes a good title to the property, if purchased before the judgment. The statute creating the lien is, that the property of the defendant is bound from the signing of the first judgment. *Cobb*, 494.

By the Act of 1810, judgments obtained in the several Courts are to be paid according to their respective dates. *Cobb*, 496. By the Act of 1822, all judgments signed on verdicts rendered at the June Term of the Court, are to be held and considered of equal date, and no execution founded on judgments obtained at the same Term, shall be entitled to any preference by being placed first in the Sheriff's hands. The judgment cannot relate back so as to do a wrong, or lay a charge upon a person who is not a party. We think, therefore, that the Court erred in his charge to the jury, that the judgment related back to the first day of the Term. What we have said in respect to the charge of the presiding Judge, objected to in the third ground of the motion for a new trial, applies equally to that excepted to in the fourth ground in that motion.

We think there is no valid objection to the verdict on the score of uncertainty.

As the cause goes back for reasons already assigned, we will not remark specially on the other grounds, further than to say that we know of no rule of law that the verdict infringes, and we would not be disposed to interfere with the facts under the evidence before us, as the jury has passed upon them.

Judgment reversed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT ATLANTA,

AUGUST TERM, 1858.

Present—JOSEPH H. LUMPKIN,
CHARLES. J. McDONALD,
HENRY L. BENNING,
} Judges.

B. W. & J. P. Force & Co., plaintiffs in error, vs. W. L. Hubbard, et al., defendants in error.

An affidavit by the creditor that the defendant is indebted so much upon a *fi. fa.* issuing upon the judgment specified, is sufficient as to the amount of the indebtedness under the attachment and garnishment Act of 1856.

Garnishment, Fulton Superior Court, April Term, 1858 Judge Bull presiding.

The affidavit upon which the summons in garnishment in this case issued, stated that "defendant was indebted to plaintiffs upon a *fi. fa.* issued upon a judgment." Counsel for defendant moved that the garnishment be discharged, on the ground that the affidavit was insufficient. The Cour granted the motion, and plaintiffs excepted.

Green B. Haygood, for plaintiffs in error.

Glenn & Cooper, *contra.*

By the Court.—LUMPKIN J., delivering the opinion.

Formerly, the attachment laws were constructed strictly; one of the provisions of which was, that any attachment sued out and returned, otherwise than the Act itself prescribed, should be void. The late law, by providing that a substantial compliance with its provisions, shall be sufficient, has intentionally overturned the old doctrine.

In this case the party swears, that there is so much due him upon the *fi. fa.* issuing upon the judgment, instead of deposing as to the indebtedness upon the judgment itself. We are clear that the affidavit is sufficient. What is due upon an execution issuing upon a judgment, is due upon the judgment upon which it issued, and no more and no less. The judgment is the evidence of the debt; the *fi. fa.* the process for enforcing it. To swear, as the creditor did in this case, that there is so much due upon the *fi. fa.* issuing upon a particular judgment, is, in substance, to swear that there is so much due upon the judgment itself. In other words, there cannot be one sum due upon the judgment, and another upon the execution.

Judgment reversed.

NEWTON M. FOSTER, plaintiff in error, vs. JEHU THOMAS, defendant in error.

Where the proof is uncertain and unsatisfactory, and the presiding Judge awards a new trial, this Court will not control his discretion.

Affidavit of illegality; motion for a new trial, in Gilmer Superior Court. Decided by Judge RICE, May Term, 1858.

On the 18th day of September, 1851, Jehu Thomas recovered a judgment in Gilmer Superior Court, against Newton M. Foster, for $193 13½; *fi. fa.* was levied on the 1st day of June, 1857, on defendant's property, when Foster filed his affidavit of illegality, alleging payment. The issue was made up and submitted to a special jury, at May Term, 1858.

On the trial, the defendant in *fi. fa.* introduced *R. R. Hunt*, who swore that he was the attorney of record for plaintiff, Thomas; that Thomas directed him to deliver the *fi. fa.* to Col. Young, who represented a claim against Thomas, as he had agreed to take it in the arrangement of said claim, which he did. That he subsequently heard Thomas and Young speak of the *fi. fa.*, and that he then understood from them that they had arranged the *fi. fa.*

The jury found a verdict for the defendant. The Court, on motion, granted a new trial, and counsel for the defendant excepted.

MARTIN; and EZZARD, for plaintiff in error.

WALKER; and UNDERWOOD, *contra.*

By the Court.—LUMPKIN, J. delivering the opinion.

For myself, I am not prepared to say, that I should have granted a new trial in this case. Still, the presiding Judge has seen fit to do so. And if he is dissatisfied, *we* do not feel constrained, by the proof, to control his discretion.

The execution is standing open. Not a dollar is shown to have been paid upon it. There is testimony as to its having been *arranged.* How arranged? This expression refers probably to the transfer of the *fi. fa.* by Thomas to his creditor, in part payment of his own debt, and does not prove satisfaction by the defendant.

Mr. Thomas, the plaintiff, said it was settled, and paid his attorney his fee. This he was bound to do when he traded the claim to a third person, whether the money had been collected or not. Indeed, he had no right to receive the money after he had transferred the execution. And it does not appear but that this conversation was after the assignment by Thomas, the original plaintiff. Of course, nothing said by him, after he had parted with the demand, could be evidence in the case, to bind the holder. There is confusion and uncertainty about the matter, and a new trial, therefore, will not hurt. Who is controlling the case? For whose benefit is the collection of the *fi. fa.* sought to be coerced? Thomas or his assignee? The Court needs more light, perhaps, upon this controversy.

Judgment affirmed.

ALFRED WEAVER, plaintiff in error, vs. BERNARD M. PETEET, defendant in error.

The testimony of an aged and infirm witness, who is unable to attend Court, taken by commission, may be read on the trial, without any preliminary proof, that the disability of the witness still continues.

Rule nisi for a new trial, Fannin Superior Court, May Term, 1858. His Honor GEORGE D. RICE, presiding.

The case is stated in the opinion of the Court.

D. A. WALKER, attorney for Weaver.

JNO. H. UNDERWOOD, attorney for Peteet.

By the Court.—LUMPKIN J. delivering the opinion.

The testimony of John Thomas, an aged and infirm person, was taken in this case, under the Acts of 1811 and 1835, (*Cobb*, 266, 268.) At the hearing the point was made, that before the evidence could be read, it was incumbent upon the party offering it, to show that the disability of the witness still continued. The Court decided otherwise, and we think rightly.

The caption to the commission is not copied in the bill of exceptions. We suppose it was in the usual form. And the presumption of law is, that the witness is still unable to attend Court. In other words, in the same condition he was in when the interrogatories were executed, until the contrary appears.

If a witness is alleged to reside out of the county, no preliminary proof is required to be made of the fact at the trial. If it be made to appear that the witness has removed within the county where the cause is pending, and the fact is known to the party who examined him by commission, in time to procure his personal attendance, the old practice, I believe, was to consider the testimony taken by the interrogatories, to be superseded. It is not necessary to decide that question. The personal attendance of the witness, also, will dispense with the testimony taken under a commission.

A person does not usually get less infirm as his years multiply. If the grass-hopper was a burden when the commission was executed, it is not apt to be less so at the trial. If the opposite party desired it, he could have subpœnaed the witness, and thus, as well as by proof, have tested his ability to attend Court personally.

Judgment affirmed.

Daniel Reed, et al., plaintiffs in error, vs. **Willie Roberts**, defendant in error.

Where a testator makes his will *in extremis*, being feeble from age and disease, and is racked with bodily pain, to make the attestation sufficient, under the statute of frauds, the testator's position should be such as to enable him, without change of situation, to see the witness subscribe the will; to bring the *factum* of the attestation within the scope of his vision, by looking in that direction.

Caveat to will, in Gordon county; motion for new trial. Decided by Judge Trippe, April Term, 1858.

Jehu Nobbet made a will, dated 14th February, 1858, and appointed Willie Roberts and George H. Hogan executors and guardians of the property and children therein named. Nobbet died, and Willie Roberts, executor, propounded the will for probate, and George H. Hogan, Daniel S. Reid; et al, entered a caveat.

The case came on for trial, and much testimony was introduced in relation to the condition and *position* of the testator at the time of attestation; which testimony is sufficiently set out in the opinion of the Court.

Counsel for the caveators requested the Court to charge the jury, "that if the situation of the parties was such that the testator might have seen the attestation of the will, by the subscribing witnesses, by rising from his bed, it was not a good attestation; that he must have been able to have seen it in his *actual position*, at the time of attestation;" which charge the Court gave to the jury, with the addition and qualification, "that if the testator might, by a slight effort, as by reaching out his hand and removing the counterpane and obstructions behind him, or by turning his head, shoulders and body in the bed, provided he was able to do so, have seen the witnesses subscribe and attest the will, it was a sufficient attestation, in his presence; but if it required any considerable effort for the testator to have seen the witnesses subscribe and attest the will, it was not a good attestation." To all of which addition and qualification to the charge requested, as given by the Court, counsel for caveators excepted, as well as to the refusal of the Court to give the charge as requested, without qualification or addition. The jury returned a verdict setting up the will.

The caveators then moved the Court for a new trial, on the following grounds, to-wit:

1st. Because the Court refused to charge the jury as requested, but did charge the same, with additions and qualifications as above set out in the charge of the Court.

2d. Because the jury, after having retired to their room to consider the case, during a recess of the Court for the night, sent their bailiff, without direction or knowledge of the Judge, for the 18th vol. Ga Rep's, and had the case of *Hall vs. Hall* read to them out of the same.

3d. Because one of the jurymen charged with this case, separated from the jury, and came out of the jury room into the Court room, during the recess of the Court for the night.

4th, 5th, 6th and 7th. Because the verdict was contrary to the law, against the evidence, and the weight of evidence.

The motion for a new trial was refused, and counsel for caveators excepted, and allege error on the charges of the Court, its refusal to charge as requested, and the refusal to grant a new trial.

Dabney & Akin, for plaintiffs in error.

Walker & Francis, for defendant in error.

By the Court.—**Lumpkin**, J. delivering the opinion.

The issue in this case is, *devisavit vel non.* And the only question which we deem it necessary to discuss is, whether the will of John Nobbett was duly attested under the statute of frauds? The Act of 29 *Car.* 2, *c.* 3, requires that the attestation of the witnesses shall be *in the presence of the testator.* Was this provision complied with in this case?

The testator executed his will *in extremis.* He was very sick, and in great pain at the time, and died shortly afterwards. The bed upon which he lay had half stand-posts for curtains. There was a counterpane stretched across the head, to protect him from the air. Thus situated, he was raised up and supported, leaning on the shoulder of a friend, until he signed the will himself. It was then taken back of the head of the bed, to a chest, against the wall, some seven or eight feet distant, where it was attested by the subscribing witnesses. It is not pretended that he actually saw them. The weight of the testimony is, that he was unable, without help, to have changed his position, so as to have seen the witnesses subscribe. It is admitted that, by removing the curtain in the rear, and turning his head, or elevating his head above the level of the screen, and turning, or by being moved more toward the side of the bed, and turning his head and shoulders, so as to have looked around the post, he could have witnessed the attestation. Under this statement of facts, the Court was requested to charge the jury, "that if the situation of parties was such that the testator might have seen the attestation of the will by the subscribing witnesses, by rising from his bed, it was not a good attestation; that he must have been able to have seen it in his *actual position*, at the time of attestation." Which charge the Court gave to the jury, with the addition and qualification, "that if the testator might, by a slight effort, or by reaching out his hand and removing the counterpane and obstructions behind him, or by turning his head, shoulders and body in the bed, provided he was able to do so, have seen the witnesses subscribe and attest the will, it was a sufficient attestation, in his presence. But if it required any considerable effort for the testator to have seen the witnesses subscribe the will, it was not a good attestation."

The jury found a verdict in favor of the will, and counsel for the caveators moved the Court to set it aside and direct a new trial, mainly on the ground, that the instruction given was a misdirection as to the law of the case. The application being refused, a writ of error is prosecuted to this Court.

It cannot be denied that the Courts, both in England and in this country, from a disposition to favor wills, have departed, not only from the strict construction, but the obvious meaning, of the statute of frauds; and the result has been, to open the door to very extensive litigation. *Shires vs. Glasscock*, 2 *Salk.* 688; *Davy vs. Smith*, 3 *ibid.* 395; *Longford vs. Eyre*, 1 *P. Wms.* 740; *Casson vs. Dade*, 1 *Bro. c. c.* 99; *Tod vs. Earl of Winchelsea*, 2 *Carr & Payne*, 488; *Broderick vs. Broderick*, 1 *P. Wms.* 239; *Doe vs. Manifold*, 1 *Maule & Selw*, 294; 12 *Common Law Rep.* 227; *Right vs. Price, Douglas*, 241; *Par. on Dev.* 90–97; *Roberts on Wills*, 163—67; *Longchamp vs. Fish.* 5 *Bos. & Pull.* 415; *Russell vs. Falls*, 3 *Harr. & McHen.* 457; *Edilen vs. Hardy*, 7 *Harr. & Johns.* 61.

But, notwithstanding Courts of Justice have thus leant strongly in favor of the validity of wills fairly made, and where there is no imputation of fraud, still there is a limit prescribed by positive law, beyond which we cannot go. The witnesses must subscribe in the presence of the testator, in some sense, or else the statute requiring this to be done, is judicially repealed.

The first case we have upon this subject, is that of *Shires vs. Glasscock, reported in* 2 *Salkel*, 688, *Carthw.* 81, *and* 1 *Equity Cases, abridged*, 403. It was decided in 3 *Jac.* 2, about eleven years after the making of the statute, and has ever since been considered a leading case, and is constantly referred to. Let us for a moment examine this case, and compare it with the one before us, and the doctrine contended for in support of this will.

Sir George Shires, being sick in bed, made his will, and signed it in the presence of three witnesses; but he, being very ill, the witnesses withdrew into a gallery, seven yards distant, between which and the chamber where the testator lay, there was a lobby, with glass doors, and the glass broken in some places. Here the witnesses subscribed the will. It was proved that the testator, from the bed where he lay, might have seen the table in the gallery, on which the witness subscribed, through the lobby and the broken glass window. *Per Curiam*: "The statute required attesting in his presence, to prevent obtruding another will in the place of the true one; it is enough if the testator might see: it is not necessary that he should actually see them signing; for at that rate, if a man should but turn his back, or look off, it would vitiate the will. Here, the signing was in view of the testator. He might have seen it, and that was enough."

This, now, is the case, and the judgment of the Court upon it. But in pronouncing the decision, it is added: "So if the testator being sick, should be in bed and the curtain drawn." Let it be rembered that this latter point was not before the Court. That it was a bald *obiter dictum.*

Well, the next case that came up, is *Davy vs. Smith,* (3 *Salk.* 395,) in which the question was, whether the witnesses to a will had pursued the statute of frauds in subscribing their names; and it was resolved, that where the testator lay in a bed in one room, and the witnesses went through a a small passage into another room, and there set their names, at a table in the middle of the room, and opposite to the door, and both that and the door of the room where the testator lay were open, so that he might see them subscribe their names, if he would, though there was no positive proof that he did see them subscribe, yet that was a sufficient attestation, within the meaning of the statute, because the testator might have seen them subscribe. And therefore, *per Curiam:* "If the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed are drawn close, it is a good subscribing within the statute."

Here we have the bed-curtain *obliter* in the previous case, resolved to be law in this, with the word "*close*" superadded, which is not in the original case, upon a state of facts which did not at all justify it. And in this form the proposition has passed into the elementary books, and is cited as a precedent, namely: that signing in the room was signing in the presence of the testator, though the testator be in bed and the curtains closely drawn. And this illustration in *Shires vs. Glasscock*, adopted as law in *Davy vs. Smith*, is the foundation of all that class of cases which hold, that where the testator had the capacity to witness the attestation, by making some *little* effort, it was a sufficient compliance with the statute.

Let us hear no more fault finding after this with *obiter dicta.* Three-fourths of all the law in force in Christendom, as can be demonstrated by reference to the English and American Reports, originated in the *obiter dicta* of Courts and Judges. And this is no random remark, recklessly made, but attested by an eminent Jurist, now occupying one of the most elevated Judicial positions in the Union.

Well may it be regretted that this doctrine of the constructive presence of the testator was ever carried so far. It has not only, in the language of Chancellor Kent, " opened *the door* to very extensive litigation," but lifted up a flood-gate, through which a torrent is rushing, that threatens to sweep away all the old landmarks of the law, upon the subject of the execution of wills. And where will it stop? If any change in the position of the testator is required, how much or how little will do? Can any rule be prescribed? If the attestation is sufficient, provided it could be seen by the testator, by drawing aside the surrounding curtains, or elevating his head over the screen at his head, or by turning his head, shoulders and body in the bed, why not, by changing the position of his whole body from the right side to the left, or even getting out of his bed? Nay, why stop at this? If the testator's situation be such that he cannot see the subscription by the witnesses, by the exertion of his own power and volition, why should it not be sufficient to satisfy the the requisition of the statute, according to this liberal and

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latitudinous construction of it, if the testator might cause himself or the witnesses to be placed in such a situation as he might see their attestation?

Presence, is not defined in the statute. It is obviously not synonimous with being in the same room. A testator may see as accurately what is passing in another room, as if done in the same room. And on the contrary, he may be so situated as not to see what is transacting in the same room where he lies, and thus have a false paper surreptitiously executed as his will. The object of the law can only be effectuated when the testator is so situated, both as to the will and the witnesses, that he may, if he choose, see both, in the act of attestation. And it is wholly immaterial whether the attestation be in the same room or in a different room. The rule is the same as to both. The will and the witnesses must both be in the presence of the testator. He ought to be able, without an effort or change of position, to see both. Perhaps, it would be requiring too much to insist that it should be shown, that he did actually see both. Witnesses engaged in the act of subscribing their names, rarely watch to see if the testator at the same time is looking on. But it should appear, in the words of one of the cases, "that *he* was so *present* to *them*, and *they* to *him*, as that he *might* and probably *did* see the attestation." This we believe to be the sum and substance of the law, and the current of decisions; and that to go beyond this, is dangerous and mischievous. It will never do to hold, that because a testator may change his situation, or cause it to be done, or remove any intervening obstruction, (without doing either,) and that thereby he might have seen the attestation, it will suffice.

The will of a blind man is an exceptional case, and one not very well settled. We leave that to be decided when the case occurs.

Why a desire to favor the wills of testators made *in extremis*, should exist in this State, we do not very well understand. Ordinarily, our statute of distribution makes the fairest disposition of a dead man's property. Here, a man advanced in life, weakened by disease, and racked with pain, is supported in bed while he subscribes his will. While in the act of executing his will, by which he bequeathes an estate of from $20,000 to 35,000 to the children by a second marriage, he forgets the amount of the pittance with which he cuts off the offspring of a former marriage, first saying, when the will was read to him, that he thought he had left to them $10 instead of $100, and then upon the second reading, $5 instead of $10! And yet, the salutary safeguards of the statute of frauds are to be broken down and disregarded, to set up such a will! It is going quite far enough to say, in such a case, that the law is satisfied by the testator being in such a situation that he *may*, from that situation, and without change of position, and without aid from others, supervise the attestation.

In this case, after the testator signed, the witnesses retired obliquely behind the head of the bed, with a counterpane intervening between them and him. It is not pretended that he did see them attest the will. It is clear that by casting his eyes, as he lay, in any direction, the *factum* of the attestation was not within the scope of his vision. The probability from the proof is, that he could not have changed his situation, from bodily infirmity and pain. He was certainly not assisted to do so by others. The attestation, therefore, being out of the scope of the testator's vision, becomes bad, as not being in his presence.

It is complained that after the jury had been charged with the cause, and retired to their room for consultation, and had been occupied for several hours in the consideration of the case, and the Court had retired for the night, they caused their bailiff, without permission from the Court, or the knowledge of the caveators or their counsel, to bring to their rooms the 18th volume of Georgia Reports, and had H. F. Buchanan, one of their body, to read the case of *Hall vs. Hall*, in the hearing of the jury.

This, to say the least of it, is an irregularity which ought not to be encouraged. If one book may be sent for, another may; and that, too, whether it was read on the trial or not. Of course, the case of *Hall vs. Hall* is good law, because found in our own Reports. Still, we see many objections to the allowance of this practice. If the presiding Judge mistake or misapply the law, the losing party has his remedy. But no exceptions can be filed, or writ of error prosecuted, to the erroneous interpretation of the law by the jury. It might, too, if sanctioned, afford to the Judge a very convenient mode of avoiding both trouble and responsibility, by simply handing over the authorities to the jury, and directing them to expound the law, as well as find the facts, for themselves.

We deem it unnecessary to notice the other points in the case. They have been waived in the argument.

Judgment reversed.

Fitz Herbert Heard, trustee, plaintiff in error, vs. Henry Sill and Wife, defendants in error.

J. H. made the following will: "I give to my son, F. H. Heard, in trust for Nancy Sill, two negroes, Bartley and Nat, with discretionary that if the said Sill relinquishes all claim against my estate for lot No. 30, 2d district, Pike county; which lot was given to him, not sold, and the said Nancy should have living children, but both of these things must occur before the said F. H. Heard is authorized to give up the negroes, Bartley and Nat, to the said Henry Sill. But the said F. H. Heard has a discretionary to give the said Nancy Sill, what he thinks is right, for the use of the negroes, Bartley and Nat, and at such times as she needs it; or in case she becomes a widow, then give her up the negroes, Bartley and Nat. Should the negroes never be given up to her, at her death they are to be equally divided between all of my children." It is admitted that Henry Sill has not relinquished his claim against the estate of the intestate upon the warranty in the deed to the Pike land, and that Nancy Sill has no children, and a bill is filed to require the defendant, as trustee, to account to Nancy Sill for the hire of the two negroes, it being alleged in the bill that she has need for the fund.

Held, That there was equity in the bill; this not being a naked power, the non-execution of which will never be aided by the Courts, but a trust power, in favor of one whose claim is founded upon the meritorious consideration of blood, and that the performance of the trust must not be nominal or illusory, but substantial and beneficial; and further, that the necessity of the *cestui que trust* need not amount to absolute want or indigence.

The case is stated in the opinion of the Court.

Jno. J. Floyd, for plaintiff in error.

Clark & Lamar, *contra*.

By the Court.—Lumpkin, J. delivering the opinion.

The complainants in this case filed their bill against the defendant, calling on him to account to them for the hire of two negroes, bequeathed to Nancy Sill by her father, Joseph Heard, under the following clause in his will:

"I give my son, F. H. Heard, in trust for Nancy Sill, two negroes, Bartley and Nat, with a discretionary, that if the said Henry Sill relinquishes all claim againt my estate, for lot of land No. 30, 2d Monroe, now Pike county, which lot was given to him, not sold, and the said Nancy should have living children, but both of these things must occur before the said Fitz Herbert Heard is authorized to give up the negroes, Bartley and Nat, to Henry Sill; but the said Fitz Herbert Heard has a discretionary to give the said Nancy Sill, what he thinks is right, for the use of the negroes, Bartley and Nat; and at such times as she needs it; or in case she becomes a widow, then give her up the negroes, Bartley and Nat. Should the negroes never be given up to her, at her death they are to be divided between all my children."

The bill alleges, that Henry Sill has not relinquished his claim againt the estate of the testator, for lot of land No. 30, 2d district of Pike county. And that Nancy Sill has no children. It is filed to require the defendant, as trustee, for Nancy Sill, to account for the hire of the two negroes, and pay over the same to her.

A demurrer was filed on the ground of want of equity in the bill, and the argument in support of the demurrer is, that it is left to the discretion of the trustee to give to the complainant, Nancy Sill, what he thinks is right, for the use of the negroes, and when she actually needs it. And that if her husband has competent means to support her, it was not the intention of the testator that she should be entitled to the hire of the negroes. And that the necessity contemplated by the testator not being alleged in the bill, the complainants have not made out such a case as entitles them to the relief sought.

As our brother Cabaniss presents forcibly and perspicuously the view he took of this question, I deem it but an act of justice to him, to incorporate his opinion entire:

"This, it seems to me, is placing too narrow a construction upon the will, and one which the clause under consideration, upon the face of it, does not authorize.

To say that the complainant is entitled to the hire of the negroes only in case of her absolute need, and in the event of her husband failing to provide competent means for her support, is adding to, and enlarging the terms of the bequest. This cannot be done by the introduction of parol testimony to prove that such was the intention of the testator; *a fortiori*, can it not be assumed to be his intention, and the clause construed accordingly. We must, therefore, arrive at the intention of the testator from the clause as it actnally stands, and must so construe it as, if possible, to give every part of it effect.

The testator, then, by the 8th clause of his will, bequeathed to his son, F. H. Heard, in trust for Nancy Sill, two negroes, Bartley and Nat, with a discretionary [power] that if the said Henry Sill relinquishes all claim against his estate for lot No. 30, 2d Monroe now Pike county, and the said Nancy should have living children, upon the concurrence of these two contingencies, he was authorized to give up the negroes to Henry Sill; and if these two contingencies had occurred, an absolute title to the negroes would have vested in Nancy Sill, and through her, in her husband, Henry Sill; and no "discretionary" [power] would have remained to the trustee. It would have been his duty to deliver up the negroes, as directed in the will; and upon his refusal, a Court of Equity would compel him to do it. In another event, he was directed by the will to deliver the negroes to complainant, Nancy Sill, that is, upon her becoming a widow; and the meaning of the clause is, if her husband, Henry Sill, should die, and leave her a widow, then the title to the negroes was to vest absolutely in her, and it would then be the duty of the trustee to deliver them to her; but "should the negroes never be given up to her," that is, should the two contingencies first mentioned never occur, and the title, therefore, fail to vest in her, and should it fail to vest in her from the third contingency not occurring, that is, her becoming a widow, then, upon the first two contingencies failing to occur, and the third likewise failing to occur, at her death the negroes were to be divided between all his children. But in the mean time, between the happening of the contingencies mentioned, and the death of Nancy Sill, the negroes were to remain in the possession of the trustee; and the question arises, and that is the question made by the demurrer, what disposition was made by the testator of the hire of the negroes, and who is entitled to it? That the testator made a final disposition of the negroes, and their hire, there can be no question. It has already been shown how he disposed of the negroes, in whom, and upon the happening of what events, the title to the negroes was to vest. Until the title finally vested in some one, how was the hire disposed of? The clause under consideration must give the answer. Neither the negroes nor their hire vested in the trustee as his own absolute property. The negroes, in a certain event, were to vest in and be divided between all the children of the testator, but not their hire; no such disposition of the hire as that, was made by the testator; it was not to fall back into and become a part of the residuum of the estate of the deceased. Who then is entitled to it? The clause of the will under consideration decides this question. The trustee, Fitz Herbert Heard, "has a discretionary [power] to give the said Nancy Sill, what he thinks is right, for the use of the negroes, Bartley and Nat, and at such times as she needs it." The only discretion left to the trustee is, in estimating what is right for the use of the negroes; and it is the duty of a Court of Equity to see that he does not abuse that discretion, by estimating the hire of the negroes unreasonably low. Nor can he withhold the hire on the ground that the complainant, Nancy Sill, does not need it. She is not to be reduced to absolute want to be entitled to the hire, but it should be appropriated by the trustee for her annual support, and at such times as are usual and customary in such cases. And if the trustee abuses this discretion, by withholding the hire entirely, a Court of Equity will compel him to perform the trust, and to account for the hire.

For these reasons the demurrer is overruled."

There is, to my mind, some embarrassment in arriving at a satisfactory construction of this clause of the testator's will. That he intended to use this legaoy as a means of coercion, in compelling his son-in-law to release him from liability upon his warranty in the deed, is clear. That he designed to create a separate estate in his daughter, in this property, may, we think, be fairly inferred from the words of the will.

In this latter object he has failed. Still, as the husband and wife have asked the aid of a Court of Equity, to enforce their claim, it is competent for that Court to lay its hands upon the wife's interest, whatever that may be, and have it secured to her sole and separate use.

Further, my own opinion respecting the will is that while the trustee was at liberty to deliver the negroes to the son-in-law upon the happening of the two events provided for by the will, still he was not bound to do so. He had a right to retain the possession, by the express terms of the testament. I speak now of the intention of the testator. Suppose the clause under consideration had stopped, without saying any thing as to the use of the negroes. That they had been simply given to the son, in trust for his sister, with power to turn them over to the son-in-law, upon the happening of the two events specified, or upon failure thereof, to the widow, if she survived her husband; and if not, at her death to the other children of the testator. I repeat, had this been the whole will as to this property, who would have been entitled to the usufruct?

It was confidently maintained upon the argument, that the daughter would have no claim to the hire of the negroes. Is this assumption correct? A. gives property to his son, in trust for his married daughter, but to be withheld from the possession of the son-in-law until certain conditions are performed; is the proposition beyond dispute, that the daughter, in the mean time, for whose benefit the trust was created, is excluded from all participation in the profits of the property? It would seem that the very contrary position would be true? And that in reply to the question, does the second clause in this item of the will enlarge the rights of the *cestui que trust*, it might be retorted, does it restrict them?

If it be true that the possession of the slaves might be withheld from Henry Sill, the husband, even though the two contingencies had both occurred, is it to be supposed, that in that case the intention of the testator was to deny to his daughter the income from the negroes? And yet, the clause must be interpreted in that case, in the same way that it would be though no release was made of the warranty, and Nancy Sill be childless.

What then is the discretion vested in Fitz Herbert Heard over this property? Should Henry Sill relinquish all claim against the testator's estate, for lot of land No. 30, in the 2d district of Pike county, and his wife Nancy have living children, then, and in that case, Fitz Herbert Heard is *authorized* to give up the negroes, Bartley and Nat, to Henry Sill. He is not bound even then to do so, but may continue to hold them in trust. I am speaking now in the language of the will, in the light of the testator's intention. But suppose the foregoing conditions are not performed, or suppose they are, and the trustee sees fit to retain the possession of the negroes, he has the discretion in the second place, to give his sister, Nancy Sill, what he thinks is right, for the use of the negroes, Bartley and Nat, and at such times as she needs it. If she becomes a widow, with or without the relinquishment, with or without children, Bartley and Nat are to be given up to her. If they are never given up for any of the foregoing reasons, at the death of Nancy Sill they are to be divided between all the testator's children.

Was the provision made for the daughter real or illusory? One that the trustee might give or keep back at his pleasure? No one pretends that *he* took any beneficial interest in these negroes. He held a power in trust for somebody else, and the question is, who is the usee? There are but two alternatives, and we are compelled to choose between them. Either the income was to be appropriated to Nancy Sill, or else it was to accumulate in the hands of Fitz Herbert Heard, to be turned over with the *corpus*, to his sister, in case of widowhood, or at her death, to all the children of the testator. Which disposition did the testator intend to make of the hire? There is nothing in the will that looks to accumulation for any body. Besides, the negroes are given to Fitz Herbert Heard, in trust, expressly for Nancy Sill. Does it not appear then that the testator himself has settled this doubt?—has spoken out upon the subject?

It is argued, and there is weight in the suggestion, that give to Sill and wife the hire, and they are content. That by doing this, you counteract the main motive which the testator had in framing his will as he did, namely, to coerce his son-in-law to make the relinquishment which he exacted of him. But this, at most, is only partially true. The title and possession are kept from him, unless he complies with the conditions.

After all, where lies the justice of the case? I try always to dig deep for that; and when found, nothing but the most imperious legal necessity can restrain me from administering it. The testator proposes to give his daughter two negroes, but saddles the gift with the incumbrance that she must have living children, and her husband must release him from liability upon his warranty to a lot of land, which he asserts he gave and did not sell him. Suppose he did give it, and the title has failed, is the daughter to get that much less than his other children? There is no equality or equity in that.

And although Sill, upon a suit upon the warranty, should recover of the estate the value of the land, he will be no better off than the rest of the children. I do not intend to say, that in such an action, the estate could be made to respond in damages. What would be the measure of damages? Certainly, not the purchase money and interest, if the land was given.

No relinquishment has been made; probably none will be. That may be the fault of Sill. There is no living children. That is his misfortune. The latter miscarriage is sufficient to cut him off from the ownership of this property. He likely waited this event before relinquishing, as without children, the release would have availed him nothing. The merits of the case, therefore, is with the complainants. And if the allegations in the bill are true, I am inclined to the opinion that the law of the case is also with them.

I take the doctrine to be this: That although it be an immutable rule, that the non-execution of a naked power will never be aided, yet, if the power be one which it is the duty of the party to exercise, he is a trustee for the exercise of the power; and has no discretion, whether he will or will not exercise it. And Chancery adopts the same principle as to trusts, and will not permit the negligence, accident, or other circumstances, to disappoint the interests of those persons for whose benefit he is called to execute it. This principle according to Lord Eldon, pervades all the cases. *Brown vs. Higgs*, 8 *Ves.* 574. This equity jurisdiction, in relieving against the defective execution of powers, is exerted in the case of the meritorious consideration of the person applying for aid—as creditors, *bona fide* purchasers, who rest their claim upon a valuable consideration, and in favor of domestic relatives, whose claims, as appointees, are founded upon the meritorious considerations of marriage or blood.

What is the discretion left to the grantee of the trust power in this case? It is simply that he shall give to his sister, *what he thinks is right for the use of Bartley and Nat.* Has he done that? By his demurrer to the bill, he admits he has given nothing. It is not left to him to judge whether or not she needs the hire. In case of disagreement between the trustee and *cestui que trust*, that must be determined by the Court. But he must give something, for this is a trust power—a power in which persons other than the grantee of the power are entitled to the benefits resulting from its execution. It becomes an imperative duty upon the grantee, then, to give what he thinks is right for the use of these negroes, to his sister. It does not depend upon his will, whether he will give or refuse. A Court of Equity will compel him to perform the trust for the benefit of his sister. And the performance must be *bona fide*, and not nominal or unsubstantial. Such an execution of the power would be no better than its non-execution, and would be construed to be fraudulent.

I will conclude with this single additional remark: That while the complainants cannot, under this will, insist upon the rule of *strictissimi juris*, as to the amount of hire, so, neither on the other hand can the defendant shelter himself under that principle, in requiring of the *cestui que trust*, to make out a case of absolute poverty or penury, before they are entitled to a decree for compensation for the use which the trustee has had of the slaves. The testator's views toward his daughter are not so narrow as this. Would the fund in the hands of the trustee add to her comfort, convenience, or pleasure, in the reasonable sense of that term? If she needs it for this purpose, she is entitled to it, in contemplation of the will. After all, this expression may mean, only, that instead of a yearly payment of the hire, which is usual, the trustee is to advance it from time to time, as she needs it, which would be the more reasonable and probable, considering that the trustee himself was expected to retain the possession of the property.

Judgment affirmed.

McDonald J. concurring.—

I am of opinion that the judgment of the Court below overruling the demurrer filed to the bill in this cause, ought to be affirmed. The negroes, Bartley and Nat, were given to the plaintiff in error, in trust for his daughter, Nancy Sill. She was unquestionable the object of the testator's bounty. The negroes were not to be delivered to her or her husband, unless he relinquished to his (testator's) estate, all claim against his estate for lot of land No. 30, in the 2d district of Monroe, now Pike county, which the will states had been given, not sold to him, and unless his daughter should have living children, and both these things were to occur before the trustee was authorized to give up the negroes to the husband.

If the events had occurred, it was still left to the discretion of the trustee, whether he would deliver the negroes to the husband. Neither the restraint upon the delivery of the negroes, nor the discretion given to the trustee in respect to the delivery of them on the happening of the conditions on which he might deliver them, affects the bequest to the daughter. The property, so far, is hers; and if retained by the trustee, is to be held for her benefit. The gift to her depends, in no manner, upon his discretion.

The clause of the will proceeds: "But the said Fitz Herbert Heard has a discretionary [right or power] to give to the said Nancy Sill what he thinks right for the negroes, Bartley and Nat, at such time as she needs it." It was obviously the intention of the testator that the negroes should be either held by the trustee, or be delivered to Henry Sill, the husband, on the happening of the contingencies mentioned, and not be hired out. If delivered to the husband, they would have been held for the benefit of the wife; if retained by the trustee, certainly for her benefit, but he to pay what he thinks right as hire, which is equivalent to reasonable hire. The word "discretionary," in this clause, is either synonymous with the words "thinks right," in the same clause, and is mere tautology, or it means he shall have discretion to hire them out, or retain them and pay what he thinks right for the hire. The latter was probably the intention, but, in either event, the daughter was to have the proceeds, whenever she needs them. The word "needs" is not to be construed in its literal sense, for it would then make the bequest conditional, on the hire being necessary to her support, when the bequest is absolutely to her, and the negroes are to be delivered without condition on her surviving her husband. The discretion is not given to the trustee to qualify the legacy, and retain the property to his own use without accounting. Whenever she needed the hire, in her own opinion of her necessities, the trustee had to pay her what he thought was right for the hire, and if he placed an unreasonably low hire upon them, so as to exhibit a selfish discretion, a Court of Chancery would put him right.

BENNING J. dissenting.

The bill of Mr. and Mrs. Sill, asks of Fitz Herbert Heard, the executor of Joseph Heard, an account of the *hire* of two negroes, Bartley and Nat.

The bill is founded on the following item, in the will of the deceased Joseph Heard: "I give my son, Fitz Herbert Heard, in trust for Nancy Sill, two negroes, Bartley and Nat, with discretionary, that if the said Henry Sill relinquishes all claim against my estate, for lot of land, No. 30, 2d Monroe, now Pike county, which lot was given to him, not sold, and the said Nancy Sill have living children, but both of these things must happen before the said Fitz Herbert Heard is authorized to give up the Negroes Bartley and Nat to Henry Sill, but the said Fitz Herbert Heard has the discretionary, to give the said Nancy Sill, what he thinks is right, for the use of the negroes Bartley and Nat, and, at such times as she may need it, or in case she becomes a widow, then, give her up the negroes, Bartley and Nat; should the negroes never be given up to her, at her death they are to be divided between all my children." I copy from a badly written copy, and there may be some small errors.

Does this item give to Mr. and Mrs. Sill, the right to the *hire* of the two negroes?

I think, that so far as *title*, is concerned, the *hire* stands on the same footing as the corpus, and, consequently, that the hire goes with the corpus, wherever that goes.

A gift of the corpus of property, is a gift of the rent or hire, unless there is something in the conveyance to prevent it from being. This may be assumed.

To whom was the gift of the corpus of the two negroes? In my opinion, to the executor, on certain conditional and successive trusts; namely, to the executor: first, in trust for Henry Sill, on condition that, he should relinquish all claim against the testator's estate, on account of the lot of land, and Mrs. Sill should have a living child by him; secondly, should both these events not happen, then, in trust for Mrs. Sill, on condition that she should become a widow; thirdly, should neither the two things on which, the first condition depended, nor the one thing on which, the second depended, happen, then, in trust, for "all" of the testator's "children." These conditions are all precedent.

Mr. and Mrs. Sill make no claim to the corpus. I think, then, that I shall be safe in assuming, that no right to the corpus, has vested in them as yet.

The hire, then, went, along with the corpus, (say, to the executor, on these same conditions;) unless there was something in the conveyance (in the item aforesaid,) to prevent it from so doing.

Is there in the item, any thing to prevent the hire from so doing? Nothing, I think. There is I think, nothing in the item to separate the *title* to the hire, from the title to the corpus. There is, it is true, something in the item, to give the executor, perhaps, a *power* over the hire, when there is nothing in it, to give him any power over the corpus; there is, in the item, a grant of "discretionary," [power,] to the executor, "to give the said Nancy Sill, what he thinks is right for the use of the negroes, Bartley and Nat, and, at such times as she may need it;" but, 1st, the grant of a power over a thing, is not a grant of the thing, itself; 2dly, if it were, the grant of this hire would, be to the *executor*, and not to Mr. and Mrs. Sill, for the grant of the power, is to the executor; at least, we may say this much, that, if the grant of this hire would be to Mr. and Mrs. Sill, it would be a grant of it, not absolute, but only on condition, that the executor should think, that she was needing it; and even then, would be a grant of only so much of it, as the executor might think, "right."

There is not, any thing, in the bill, to show, that Mr. and Mrs. Sill has "need" for this hire, or, for any part of it; and if there was, there is nothing in the bill, to show, either that the executor thinks so, or, if he does, how much of the hire it is, which he "thinks" "right" for her.

I say, then, that the hire no more went to Mr. and Mrs. Sill, than did the corpus; but that if it did, it did so, on condition that she had need for it and the executor thought that she had—events neither of which has happened.

Hence, I must further say, that, I think, that the Court below erred in not sustaining the demurrer to the bill. In this I dissent from the Court.

HENRY S. CHANCE, plaintiff in error, vs. ABBOT M. McWHORTER et al. defendants in error.

A vendor's lien upon land for the unpaid purchase money, will not be set aside in favor of a mortgage given by the vendee to secure an antecedent debt; nor will a purchaser, with notice at a judicial sale under the foreclosure of said mortgage, be protected against said lien; especially where he is a joint debtor, with the mortgagor, upon the debt intended to be secured, and the price at which the property was bid off by him is applied to the payment of said debt.

In Chancery, from Carroll Superior Court. April Term, 1858. Honorable GEORGE L. RICE presiding.

See the statement set out in the opinion of the Court.

MERRELL, for plaintiff in error.

CHISHOLM & WADDELL, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

This was a bill filed by the complainant against the defendants, and containing, amongst other things, the following charges and allegations in substance, to-wit: That complainant on the 14th day of February, in the year 1854, sold to the defendant Abbott M. McWhorter, lot of land, No. 147, in the second district of Carroll county, and executed to him, an absolute deed of conveyance for the same; and took said defendant McWhorter's notes for $1,050 for the purchase money, and that said McWhorter entered into and took possession of said lot of land in pursuance of the said purchase. That afterwards to-wit, on the 27th day of May, in the year 1854, the said defendant McWhorter executed a mortgage deed, conveying said lot of land to the firm of J. S. Farrer & Brothers, to secure the payment of a debt of $481 58-100, which was owing by the defendants, Abbott M. McWhorter, Larkin H. Davis and Alfred B. Davis, merchants and partners, using the name and style of Davis, McWhorter, & Co.; said firm debts having been contracted, long before the sale of said land by the complainant to the said McWhorter. That said defendants fraudulently executed said mortgage, for the purpose of depriving complainant of his equitable lien on said land for the balance of his purchase money, namely, $708 24-100, besides interest, which was yet due and unpaid; and for which he held no security, but the notes of the said McWhorter. That J. S. Farrer and brothers proceeded to foreclose said mortgage, and had the execution issuing thereon, levied on the said lot of land, and the same was sold on the 1st Tuesday in July, 1857, at which time complainant by public proclamation before any bid was made, gave notice that he should seek to enforce his lien on said land for the purchase money still due thereon. That defendant Davis was present and near enough at the time to have heard the same, before he bought; and the complainant believes and so charges, that the defendant Davis did hear all that was then and there said by complainant, in relation to said land, and the sale thereof; and that complainant would seek by virtue of his vendor's lien, to subject said land to the payment of the purchase money still owing thereon; and that the said Davis, then and there became the purchaser of the said lot of land No. 147, in the second district of Carroll county, with full, complete and perfect notice and knowledge of complainant's equitable right in and lien upon the same; and that he the said Larkin H. Davis now holds a deed from the Sheriff, conveying to him, all the interest, title and claim, to the said lot of land, that the said Abbott M. McWhorter had therein before the sale. That said L. H. Davis bid off said lot of land, at and for the sum of $696, when the same was worth $1,200; and but for complainant's lien aforesaid, would have brought that sum; that the money arising from the said sale, paid off the debt, due by the defendants to J. S. Farrer and Brothers; and left a surplus of $100, which was applied to the discharge of a debt, owing by the defendants to Gilland & Howell, or some other person; that the Sheriff has executed titles to Davis to the land; and that he is about to transfer the same to an innocent purchaser for value, without notice.

The bill contains a prayer that Davis be enjoined from conveying the land; that the same be resold and the proceeds applied to the extinguishment of complainant's lien, and a decree against the defendant McWhorter for the amount of the notes.

To this bill, a general demurrer was filed for want of equity; and upon argument had thereon, the presiding Judge sustained the demurrer, and ordered the bill to be dismissed.

Was there equity in the bill? In other words, can the complainant in such a case as this, assert a lien on the land sold to McWhorter for so much of the purchase money as remains unpaid?

As between vendor and vendee, the settled rule is, to sustain the implied lien for the purchase money, where the mere personal security of the purchaser has been taken, and on the other hand to consider the implied lien as waived, whenever the security of a third person is given. See *Blount's Ambler*, 723, (*n.* 1.) where all the English authorities are collected and arranged; and also 4 *Kent's Com.* 146, and cases there cited.

In this case, it is not pretended, that there was any collateral security of a third person taken; or any agreement or understanding, that the vendor should or would relinquish his right to look to the property for the payment of the purchase money. The lien then clearly existed as against McWhorter. Has it become subordinate to the mortgage given by McWhorter to J. S. Farrer and Brothers, and the judicial sale under it? That is the question, and it is an important one; and one that has never been decided by this Court.

There is to say the least of it, an apparent conflict of authority upon this point and a bright array of names on both sides. The Supreme Court of the United States, is supposed to have adjudged this question, for the defendants in the Court below, and the defendants in error in this Court in *Bailey vs. Greenleaf and others*, (7 *Wheaton*, 46;) and the Supreme Court of Maryland, in *Roberts vs. Salisbury*, (3 *Gill and Johns.* 425;) and of Tennessee, in *Gann vs. Chester*, (5 *Yerger*, 205) are cited in support of the same doctrine. In *Shirley vs. The Congress Sugar Refinery, and another*, (2 *Edward's V. C. Rep.* 511;) the N. Y. Court dissents from the opinion of the Supreme Court of the United States. And in *Truloe vs. Williams*, (3 *Wharton* 493;) it is decidedly condemned by Chief Justice Gibson, who pronounces it, "unsatisfactory upon principle and precedent." And to the memory of the late lamented Gibson, I beg leave to record this passing tribute, that while at the time of his death, he had been longer in office than any cotemporary Judge in the world; that none other on earth, united the same originality, vigor, clearness, precision of thought with the same elegance and felicity of expression. He is unquestionably for force and beauty of style, the ablest judicial writer that this or any other country has produced. His decisions and Lord Stowell's, are amongst the few, that all lawyers love to read.

Chief Justice Marshall in delivering the opinion of the Supreme Court, in *Bailey vs. Greenleaf*, considers that the vendor's lien cannot be asserted against creditors, holding under a *bona fide* conveyance from the vendee; and doubts whether it is settled in England, that the lien remains against the assignees of a bankrupt or creditor coming in under the purchaser, by act or operation of law.

Vice Chancellor Edwards, in commenting upon this decision, *Shirley vs. The Sugar Refinery*, remarks: "Had the learned Chief Justice gone a little further and looked into some later cases, particularly, *Grant vs. Mills*, (2 *V. and Beam.* 306;) *and ex parte Peake*, (1 *M. C. Rep.* 346,) (which do not appear to have fallen under his observation,) it is probable his doubts upon this point, would have been removed. In the first of these cases, Sir Wm. Grant treats it as a settled rule, not to be disputed, that whatever equity, the vendor would have against the purchaser, he is entitled to, against his assignee; and in the last case, where the question was between the vendor and the assignee, and creditors of a bankrupt vendee, Sir Thomas Plumer, V. C. lays it down as clear, that the vendor's lien exists against the assignee, where the vendee becomes bankrupt, they being in no better condition than the bankrupt himself."

And I beg leave to add, why should they be? Why should the assignees be in any better condition than the assignors? They pay no purchase money on the transfer, and take only what the debtor had; and as he held it, subject to all countervailing equities. The doctrine in England in bankrupt cases, is not distputed. (2 *Sudg. on vendors*, 81; 12 *Ves. jun.* 349; *Milford vs. Milford*, 9 *Ves. jun.*, 99; 2 *V. and Beam.* 309; *Powell on Mortgages*, 542; *Taylor vs. Wheeler*, 2 *Vernon*, 564; *Finch vs. Winchelsea*, 1 *P. Wms.*, 280; *Cowper*, 565; *Dougl.* 636.) The American cases, with but few exceptions, accord with the English decisions, and establish the principle, that it is only the purchaser, who has paid a valuable consideration, on the transfer, without notice, in the ordinary course of business, that is protected, and put in any better situation than the assignor (1 *Dall.* 430; 4

Brow. 368; 3 *Raule,* 99, 203; 4 *Raule,* 345, 354; *Wolf vs Erchelberger,* 2 *Penn. Rep.,* 346; 1 *Wharton,* 433; 10 *Johns. Rep.* 540; 13 *Wend.,* 570; 16 *Wend.* 574; 15 *Mass. Rep.,* 156.)

Mr. Sugden, now Lord St. Leonards, the distinguished author of the treatise on the law of vendors, (now in its 9th edition,) after laying down the rule, that persons coming in under the purchaser by act of law, as assignees of a bankrupt, are bound by an equitable lien, although they had no notice of its existence; because the assignment by operation of law, passes the right of a bankrupt, precisely in the same plight and condition, as he possessed them, observes: "And the creditors claiming under a conveyance from the purchaser, are bound in like manner as assignees, because they stand in the same situation as creditors under a commission." (2 *Volume* 74, 75.)

And in *Farrell vs. Heelis,* (*Ambler,* 723;) Earl Bathurst acknowledged the rule to be, that the equitable lien for the purchase money, where the seller has not waived it by taking other security, is good, not only against the purchaser, but against his creditors, whether under a commission or under a deed of trust, in the nature of a commission. It is certain, he says, that persons claiming under such a deed, stand in the same situation as creditors, under a commission.

Without consuming more time in collating the cases, we remark that this question has been substantially passed upon by this Court. In *Webb vs. Robinson,* (16 *Ga. Rep.* 216;) after an extensive review of the authorities, this Court say, (page 230,) "Our position is, that the protection of the creditor, depends upon the circumstances under which the debt was contracted. If without notice he is protected. *Antecedent debts do not therefore belong to the protecting class.*"

Farrer & Brothers were not induced to extend credit to McWhorter, the vendee, on the faith of this property. The debt to them, to secure which the mortgage was taken, was contracted long prior to the sale.

In *Mourice vs. Byars and others*, (16 *Ga. Rep.* 469;) Judge Starnes, in delivering the opinion of the Court, very properly remarks, that the vendor's lien is not postponed, to even a judgment creditor, who becomes so, before the conveyance to the debtor, *page* 477.

In the case of *Scott, Carhart & Co. vs. Warren & Spicer*, (21 *Ga. Rep.* 410;) the Judge who delivered the first opinion in that case, says: "It is conceded, that a vendor's lien is protected against an older judgment." And in the same case, Judge BENNING, says: "The judgment of the creditor, did not give credit on the faith of the mortgaged property; for he credited before his debtor had acquired any interest in that property. The mortgagee credited exclusively on the faith of that property;" so we repeat here, that Farrer & Brothers did not credit Davis, McWhorter & Co. on the faith of this mortgaged property; for the credit was given to them before McWhorter, one of the debtor-firm, acquired any interest in that property. Chance credited McWhorter exclusively on the faith of that property.

Judge McDONALD dissented from the majority of the Court, upon the main point decided in the case last referred to, upon the ground, that the vendor by executing a conveyance and taking a mortgage, had parted with the title, and waived thereby his equitable lien and placed himself upon a footing with other creditors. We do not understand him, as disagreeing upon this point:

If this doctrine be correct, upon what principle can the demurrer be maintained? Is not the lien of a judgment creditor, equal in every respect to that of a mortgage creditor? When a contest arises between them in the distribution of funds, arising from the sale of the debtor's property, it is the priority of date that gives to one the preference over the other.

In the case at Bar, suppose the mortgaged premises had been sold under an antecedent judgment, and notice given at the sale of the vendor's lien; the purchaser, would be subject to that lien, and yet the judgment creditor would hold against a junior mortgage. Would it not be absurd then to hold, that a purchaser under the mortgage with like notice, would be protected? A sale under the judgment, would not protect the purchaser with notice, and yet a sale under the mortgage would, when the money arising from the latter sale, would be paid over to the older judgment lien, as against the mortgage creditor!

But the strong and unanswerable view of this subject is this, as against the vendor's lien in this case, the mortgagee is a mere *volunteer*. He paid no present consideration, and gave up no present right in order to obtain this mortgage. And while it is not strictly a voluntary conveyance, under the statute of Elizabeth, the object being to secure a pre-existing debt; but to put the rights of such parties upon the same footing with actual purchasers for a valuable consideration, without notice, is to confound two legal principles, which are wholly distinct in their equities. Farrer & Brothers have surrendered nothing; they have made no fresh advances of money or goods; they have parted with no right, substantive or formal in compensation for this mortgage: they cannot be placed in the category of purchasers, by their character or position.

A junior judgment, or a junior mortgage, to the date of the sale, to enforce the payment of a debt contracted upon the faith of this property, would set aside the vendor's lien. For in the language of Chief Justice Marshall, in *Baily vs. Greenleaf*, "to the world, the vendee appears to hold the estate, divested of any trust whatever. And credit is given to him in the confidence, that the property is his own in equity as well as law. It would seem, therefore, inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a Court of chancery to the exclusion of *bona fide creditors*."

I subscribe cordially to this doctrine, and for myself, I would go further and express the desire, that the whole doctrine of the vendor's lien should be abolished by the Legislature; and in lieu thereof, enact, that the vendor should reduce his lien to mortgage and have it recorded as are all other mortgages, giving it a preference over all other liens, where by law, the vendor is now entitled to be preferred. But we are not here to make law.

Who does Chief Justice Marshall mean by *bona fide* creditors? Certainly not those who represent antecedent debts. It does not distinctly appear, from the report of *Bailey vs. Greenleaf*, that it was a case of this sort. The contrary is likely true. The creditor for whose security the conveyance was made, had entered into engagements for Greenleaf's, the plaintiff's vendee, to a large amount; and the deed was made to secure these, and also to secure the creditor for any further advancements he might make, or future engagements he might enter into an account of Greenleaf. The creditor, therefore, may have made further advances, and inccurred subsequent liabilities on the credit of the security; and if so, he was a mortgagee, as he appears to have been considered, not merely for antecedently contracted debts, but also in consideration of fresh advances and liabilities. Under such circumstances, without notice of the prior lien claimed by the vendor for the purchase money, the right of the mortgagee might well be preferred. Many of the remarks which fell from the Court would seem to apply solely to a case of the latter description; while some of them proceeded apparently upon the broader ground, which we have been considering. One thing is certain, the decision fails to show any distinction between assignments in bankruptcy and statutory insolvency, which if not admitted to be, nevertheless *are*, clearly established to be, adverse to the conclusion, at which the Court came in *Bailey vs. Greenleaf;* and an assignment by the act of the party. It fails to show further, that by the latter, antecedent creditors became purchasers for a specific consideration. And both of these were necessary to constitute this an authority against the plaintiff in error.

But aside from and independent of these general grounds, Davis, the purchaser, against whom this vendor's lien is sought to be set up, has no equity under the facts of this case. The bill charges, that the mortgage was given to secure a debt, which Davis, the purchaser, McWhorter and one A. B. Davis, the other partner, were jointly owing. That at the sale under the mortgage foreclosure, Davis bid off the land, at the sum of $694 00; and that the proceeds were applied to the payment of the partnership debt, due to Farrer & Brothers; and one other debt of the same character, due to Gilland & Harrell. Davis bought the land at a trifle over one-half its value; and was enabled to do so, on account of the incumbrance hanging over it. The purchase money went to the discharge of a debt which he was legally bound to pay. Instead of paying for the land, the money went to the discharge of his own debt. What equity has he then, against the vendor? The case is simply this. Here is a vendor endeavoring to assert and enforce his lien, against a purchaser who bought with full notice, that the purchase money was unpaid, and who has paid nothing for the property except what went to the extinguishment of his own debt!

Again it is charged in the bill, that the defendant Davis and McWhorter, fraudulently combined and collusively executed the mortgage to Farrer & Brothers, for the purpose of defeating Chance, the complainant, in the collection of his purchase money; and destroying his vendor's lien upon the land. Is argument or authority needed to show, that an advantage thus erroneously obtained, will not be countenanced? The general rule is conceded, that a purchaser with notice, from one without notice, will be protected, that is, that if Farrer & Brothers were *bona fide* purchasers from McWhorter, and we have endeavored to prove they were not, and Davis had bought from them, his title would have been good, notwithstanding express notice could be brought home to him. But, suppose this second purchaser, knowing the vendor's lien, and consequently, that if he should buy directly from the vendee, he could not be protected, concocts a plan to accomplish that circuitously, which he could not do directly. And in furtherance of it, confederating with McWhorter, he procures this mortgage to be made, and by a judicial sale, gets the land at a little over half its value? And the price that he does pay, goes to his own debt? Does not a bill, pregnant with such weighty averments, require an answer? Admitting them by demurring to be true, should it be dismissed for want of equity?

In every aspect of this case, the merits of it, are with the vendor. When Farrer & Brother's took the mortgage from McWhorter, they parted with nothing. They executed no satisfaction, no release. The act and effort of McWhorter to secure the creditor, was therefore gratuitous. The land destined to pay the creditor, continued under the mortgage subject to the same equities, which adhered to it before. And yet the creditor has actually been paid; and that too by the debtor, who was legally liable for the debt. He is not hurt. Were it otherwise, the blame rests where it should. Let him pocket the loss.

Judgment reversed.

E. N. Calhoun and J. S. Williams, plaintiffs in error, vs Mary Stokes, defendant in error.

A new trial will be granted, when the verdict is strongly and decidedly against the weight of evidence.

Motion for a new trial. Fulton Superior Court, April Term, 1858, His Honor, Judge O. A. Bull, presiding.

This was an action, in the statutory form of complaint, by Mary Stokes, against Dr. Ezekiel N. Calhoun and John S. Williams, on a promissory note, given by Calhoun as principal, and Williams as his security, for the hire of a negro for the year 1855. The note was for ninety dollars. The defendant Calhoun, plead as an off-set, an account against plaintiff, amounting to eighty-three dollars, being for medical services, &c., rendered to said negro while sick in the months of November and December, 1855, and while in defendant's service.

The jury under the testimony and charge of the Court, found for the plaintiff the full amount of the note sued for. Defendant moved for a new trial, which the Court below refused, and defendant excepted, and assigned said refusal as error.

James M. Calhoun, for plaintiff in error.

Thomas W. J. Hill; and Hammond & Son, *contra*.

By the Court.—Lumpkin J. delivering the opinion.

It is in proof by Miss Gay, that at the time the negro was hired at Decatur, in December 1854, by her mother, to Dr. Calhoun, that it was expressly agreed, that if the negro became sick, her mother was to take him home and have him doctored. That her mother preferred having the boy at home, and to procure other medical attendance if he became sick, than that of Dr. Calhoun's; and that she refused to hire the negro upon any other terms. By express contract then between the parties, the hirer, Dr. Calhoun, was released from his legal obligation, to have the negro doctored in sickness.

It is to be inferred from the testimony, that Dr. Calhoun failed to notify the owner Mrs. Stokes of the sickness of the slave, as he promised to do, until it was too late to have him removed with safety. The evidence upon this point is not so full and satisfactory as it might have been. Mrs. Stokes, learning that the boy, King, was sick, repairs to the premises of the defendant, in company with her daughter, Miss Gay, sometime in the month of November, where she meets Drs. Hillyer and Wilson; and what transpired on that occasion, is in the record. Dr. Calhoun had been treating the case, which was one of Typhus *Gravior;* it lasted two months, and its violence was such as usually characterizes that disease.

We think it may be safely assumed, that Mrs. Stokes, so far from dismissing Dr. Calhoun or desiring to do so, concluded, that it was best for him to continue the treatment of the case, and so expressed herself to him; and that too, after he had absolutely refused to allow a consulting physician to be called in, at the instance of the plaintiff.

If when Mrs. Stokes was informed that her negro was sick, she had have left the matter as it stood, under the original understanding between Dr. Calhoun and herself, or expressly thrown upon him the responsibility of treating the negro at his own risk and gratuitously, the case might have been different.

After all, does not justice require, that Dr. Calhoun should be allowed reasonable compensation, at least, from the time that he was employed by Mrs. Stokes, to treat the boy, for what she did and said amounted to that. He was cured of a malignant attack; what physician could have done more? Many might have done worse; the two month's board, five dollars per month, is quite reasonable. Less than it would have cost the mistress, including the expenses of removal and nursing. The merits of this case are with the defendant. As to the reasonableness of his bill, I cannot speak. It is sustained by the testimony of Messrs. Hillyer & Wilson, the latter, himself selected, by Mrs. Stokes, as the physician, to be associated with Dr. Calhoun, in the treatment of the case. And by the way, this additional expense has been saved to Mrs. Stokes, by the absolute, or obstinate if you please, refusal of Dr. Calhoun, to suffer a consulting physician to be called in; which is all she ever proposed doing. She never did offer to supersede Dr. Calhoun, or dispense with him altogether. Whether Dr. Calhoun be entitled to charge for as many visits in attending the negro as he did, upon his own premises, or in his own infirmary, is rather a question perhaps for the jury, than the Court.

I have felt no inclination to contrast the testimony in this case. It can hardly be said to be conflicting. It is not amiss to remark, that on one side, it partakes a little perhaps of the spiciness which is peculiar to some temperaments, and which any daughter might naturally feel, at the supposed wrongs done to a parent.

I may have gone beyond what the case strictly required, in several of the suggestions, which I have made. My motive has been to induce the parties to arrest this litigation by adjusting the controversy upon the principles of equity.

Judgment reversed.

R. M. Brown, Clerk, plaintiff in error, vs. L. E. Bleckley, Sol. Gen'l., defendant in error.

Under the Act of 1850, (*Cobb* 863,) Sheriffs, Solicitors General, and other collecting officers of the several counties of this State, are required to pay over to the Clerks of the Superior Courts of the several counties in this State, their proportionate amount of all moneys arising from fines and forfeitures to the oldest orders passed in their favor, for costs due on insolvent State cases; the right of retainer being given to said collecting officers, when they hold the oldest orders.

Moneys arising from fines and forfeitures in Fulton county, bound for costs due in DeKalb county, before those counties were divided.

Motion, in Fulton Superior Court, April Term, 1858, Judge BULL, presiding.

Upon the application of Robert M. Brown, Clerk of the Superior Court of DeKalb county, the Court granted the following *rule nisi*, directed to Logan E. Bleckley, Solicitor General of the Coweta Circuit, viz:

Robert M. Brown, Clerk Superior Court, DeKalb county,
vs.
L. E. Bleckley, Solicitor General of Coweta Circuit.
Rule Nisi, in Fulton Superior Court October Term, 1856.

On motion of counsel for plaintiff, ordered by the Court that L. E. Bleckley, Solicitor General of the Coweta Circuit, show cause to-morrow morning, or so soon as counsel can be heard, why he should not pay to plaintiff or his attorney, all monies in his hands raised from fines and forfeitures in said county, in pursuance of an order of the Superior Court of DeKalb county, passed at October Term, 1853, and an Act of the General Assembly of this State, assented to February 16th, 1854, entitled "An Act to authorize the payment of certain accounts therein specified," to be applied towards the payment of the costs due said Brown, as Clerk of the Superior Court of DeKalb county, before the passage of said Act.

Answer of L. E. Bleckley.

Respondent answers, that he has in hand ninety-five dollars, and will pay it out as the Court shall direct. There is more than that amount due him on an order for costs granted him by the Superior Court of Fulton county. There is also a considerable balance due to B. F. Bomar, former Clerk, on an order in his favor, October 17th, 1856.

L. E. BLECKLEY, *Sol. Gen'l.*

After argument, the Court refused to make the rule absolute, and counsel for Brown excepted.

J. M. & W. L. CALHOUN, for plaintiff in error.

L. E. BLECKLEY, in *propria persona, contra.*

By the Court.—LUMPKIN J. delivering the opinion.

The Clerk based his claim in this case, upon the Act of 16th February, 1854; and the Court looking to that Act alone, very properly repudiated the application. That Act was called for entirely, to meet the exigency growing out of the formation of the new county of Fulton out of the county of DeKalb. It provides, "that the accounts heretofore examined and allowed by the Judge of the Superior Courts of the Coweta Circuit, in favor of the officers of the county of DeKalb, before the organization of the county of Fulton, for costs due them, on insolvent criminal cases, and those in which the State was cast, be paid out of any moneys raised from fines and forfeitures in said counties, in the order in which they were allowed." *Pamphlet Acts, p.* 327.

This Act was merely intended to secure to the officers of DeKalb county, from Fulton county, the payment of their proper proportion of costs which was due and owing, before Fulton was cut off from DeKalb; and nothing more. So also was the Act passed on the same day, by the same Legislature, *Pamphlet Acts, p.* 108. This Act requires of Solicitors General, within their respective Circuits, to pay over at the Fall Term of the Courts, in each county, all unsettled balances in their hands, to the county Treasurer.

The question in this case depends upon the construction of the Act of 1850. *Cobb* 863. And although this Act is very badly worded and punctuated, still we think the meaning is unmistakable. It provides "that from and after its passage, it shall be the duty of Sheriffs and Solicitors General, and other collecting officers of the several counties of this State, and they are hereby required to pay over to the Clerks of the Superior Courts of the several counties in this State, their proportionate amount of all moneys arising from fines and forfeitures to the oldest orders passed in their favor for costs due on insolvent State cases, said Sheriffs and Solicitors, reserving their proportionate amount in like manner."

This Act gives priority to the oldest orders for costs due on insolvent State cases. If of the same date, to be paid proportionally. It gives also to the officer collecting the fund, the right of retainer, should he hold the oldest lien. And the only discrimination now made under the law, is between Solicitors themselves. The incumbent is entitled to a preference, over his predecessors, where the money is collected during his Term. *Acts of* 1849—*Cobb* 363.

The Act of 1856, then makes it obligatory upon the Solitors General, to pay over all moneys arising from fines and forfeitures, to the oldest orders passed, for cost due on insolvent State cases, deducting the cost due in the particular case first. And the Act of 1854, first quoted, puts this fund, when raised in Fulton county, upon the same footing as if it had been raised in DeKalb, as to costs due, before the division of those counties. If then, Brown, the Clerk of DeKalb has older orders than the Solicitor, the Solicitor is bound under the Act of 1850, to pay the balance in his hands to the Clerk. And such is the old law and practice of the Courts. It is equitable and just, making no distinction between officers equally meritorious.

Judgment reversed.

GEORGE C. HEARD, plaintiff in error, vs. HOCKLEY C. MCKEE, defendant in error.

[1.] Where interrogatories are substantially answered as to every material point, it is sufficient.

[2.] Where a witness is examined a second time by the same party in the same cause, to correct a mistake made in his answers to the first set of interrogatories, there is no impropriety in the witness being furnished with a copy of his previous answers, by the party or the counsel in the cause. The object in taking testimony being for the ascertainment of truth and not to entrap witnesses.

[3.] It is always incumbent on the plaintiff in error, to show affirmatively, that the decision complained of is erroneous. And when the interrogatory is not incorporated in the bill of exceptions, and the answer is legal or not, according to the question propounded, this Court will presume in favor of the judgment, that the question was asked in that form, which would authorize the answer.

[4.] It is inadmissible, for a defendant to prove the burning of his house and papers, in order to raise the presumption, that a receipt against the plaintiff's demand, was destroyed, there being no proof whatever of the existence of the receipt.

[5.] Hearsay evidence, as well as the sayings of the party are inadmissible.

[6.] The acts of a party, or his agents, are admissible, but not their declarations, unless made at the time, and explanatory of those acts.

Complaint, from Troup Superior Court, tried before Judge BULL, May Term, 1858.

This was an action by Hockley C. McKee, against George C. Heard, to recover one hundred and ninety dollars, the balance alleged to be due for a rockaway and harness, sold by plaintiff to defendant.

At the trial, but before the case was submitted to the jury, defendant's counsel moved to exclude or suppress the depositions of Joseph A. Roberts, a witness examined by commission, on the grounds:

1st. That the interrogatories were not fully answered.

2d. That the answers were made out, or given according to instructions received by the witness from plaintiff's counsel. The motion to exclude was overruled by the Court, and defendant excepted.

Brief of evidence. For Plaintiff.

Joseph A. Roberts examined by commission, testified in substance, as follows:

1st. I know the parties.

2d. I have looked on the annexed bill of particulars and know that the articles therein specified, were sold by me as agent of Hockley C. McKee, to the defendant. The sale was made July 9th, 1853; I was clerk and agent of plaintiff at that time. The price agreed to be paid for rockaway, harness, &c., was three hundred and forty dollars, for which he was to pay cash. They were worth three hundred and forty dollars cash at that time. (The bill of particulars was the same as the one sued on.)

3d. On the morning of the sale, George C. Heard called on me, at H. C. McKee's repository, in company with George Pitts, and stated that he wanted to buy a rockaway and harness. After looking through the stock, he selected one, requesting me to put the price as low as possible, as he intended to pay cash. The price above stated, was agreed on, after which, Mr. Heard left, without paying the money. In the evening of the same day, about three o'clock, Mr. Heard sent one of Hatcher & Pitts' boys from the stable, after the article selected by him, and I delivered the carriage and harness to the boy. Shortly after, I went down to Hatcher & Pitts' stable to get the money of Mr. Heard, but found he had left, taking the rockaway and harness with him, and Mr. Pitts informed me he had said nothing to him about paying for it, but he, Pitts, supposed he had forgotten it, but that it would be all right, and that Heard would pay for it. If he did not he, Pitts, would. I saw nothing of Mr. Heard until the 10th of October following, when he came to Mr. McKee's place and bought a set of double harness, for which he paid me forty dollars cash, which was duly entered on the cash book at the time. I then mentioned about his paying for the rockaway. He said that Hatcher & Pitts would pay for it, they having money of his in their hands. He thought they had already done so. He seemed surprised that it was still unpaid. I then took the bill to Hatcher & Pitts, and they informed me they had one hundred and fifty dollars of his, Heard's money, in their possession, which amount they paid over, the balance is still unpaid. Nothing was said at the time of the purchase, of interest, as it was to be a cash transaction, and it is the rule of H. C. McKee to charge interest in all cases where the cash is not paid. The forty dollars paid by Heard was paid for the purchase of a set of double harness, as above stated, and was a separate transaction from that in the bill of particulars. I never heard plaintiff say that defendant had paid the account, but on the contrary, have heard him say to defendant that he had not paid it. Heard insisting that it was paid, and saying that if I would swear it was not paid, he would pay it without suit. I replied that I would do so; he then left apparently in a great passion.

4th. In my answers to my first set of interrogatories, the word plaintiff was used by mistake as it should have been defendant, as mentioned in the latter part of my answer to the third interrogatory.

Cross-Examined.—1st. The plaintiff McKee was not present at the sale of the rockaway and harness, he being absent from the State. Nothing was said to me at the time, about taking a claim on Hatcher & Pitts; Heard saying he was going to pay the money. Hatcher & Pitts did pay me one hundred and fifty dollars on said account for Mr. Heard, in October, 1853; Mr. Heard did not pay me at the time of sale, nor has he since that time paid the balance due on said account, one hundred and ninety dollars, but the same is still unpaid. I had no conversation with Mr. Heard on the steps of plaintiff's carriage repository, for the plain and simple reason, that there are no steps there. I have never received from G. C. Heard but forty dollars, and this is for a set of double harness, bought subsequent to the sale of the rockaway and harness, and this was in payment for the said set of double harness; and I never saw defendant Heard pay plaintiff McKee any money at any time. Plaintiff never said in my presence he had been paid by defendant, but did say he never had paid it. To the reading of the words, "but did say he never had paid it," defendant objected. The Court overruled the objection and defendant by his counsel excepted.

2d. That a conversation did take place in plaintiff's office, between plaintiff and Heard and myself. No one else was present at the time, as I recollect; the time was shortly before the commencement of this action. The defendant Heard asserted that he had paid for the rockaway and harness, but had not paid for the set of double harness, subsequently bought by him. Plaintiff, McKee said he had never received the money, that he was absent from this place most of the year, and I transacted his business for him, referring Mr. Heard to me. I then explained to Mr. Heard, that he was mistaken, and that it was the harness he paid for as above stated, and not the rockaway and harness, and the amount claimed was still due and unpaid, to prove which, I produced my books, which he refused to examine, swearing he had paid the account; but if I would swear to it, he would pay it without suit. To which I replied, that I would certainly swear to it, having the evidence of my books, while he was only swearing by his memory or recollection. This was all that passed, and the only time I ever saw plaintiff and defendant together.

3d. I have testified before in this case; I have seen a copy of the answers and notice the mistake in the answer to the third cross interrogatory, where the word plaintiff was written by mistake, instead of defendant. I have had no conversation with any one about this case, or my present or former answers; only, Mr. Russell handed me a copy of my answers, saying they would have to be taken again, as there was a mistake in them. I was at the time of this sale, a clerk, and authorized agent of H. C. McKee, receiving for my services a fixed and stated sum of money, in no way depending on the amount of sales made or business done. I know the amount claimed by plaintiff, say, one hundred and ninety dollars is still due, and has never been paid by defendant. Mr. Pitts came to me with forty dollars, which he said Heard had left with him to pay for a set of double harness bought by said Heard on the 10th of October, as above stated, I informed Mr. Pitts that Heard had paid at the time for the double harness, but that he owed a balance on rockaway and harness, on which I would credit the forty dollars. Pitts said he was not authorized to pay it in that way, and so the matter ended; and the forty dollars was not received by me or the plaintiff. I never saw George Gullen offer money to the plaintiff, but plaintiff has stated to me that Gullen, came to him during my absence, and made the same proposition as Mr. Pitts did, about paying the forty dollars, plaintiff replying to Gullen that they could find no such charge as they claimed to be due, viz, forty dollars. But that he knew nothing about it, but they must wait until my return to settle it. This is all I know. I know nothing that will benefit defendant, as the money is still owing.

Plaintiff here closed his case.

For Defendant.

George Gullen examined by commission, testified as follows:

1st. He knows the parties:

2d. Defendant placed in the hands of witness twenty dollars and requested him to go to the carriage repository of plaintiff, in Columbus, Georgia, and pay what the defendant owed to the plaintiff, if he owed anything at all. Witness called and enquired of Joseph A. Roberts, the partner and clerk of the plaintiff, if defendant owed anything, to which Roberts replied, that he did not; witness returned and handed the money (twenty dollars) to George I. Pitts defendant. Witness enquired of Roberts, if defendant owed plaintiff anything. Roberts looked over the books of the repository and replied, that defendant owed plaintiff nothing. This was all that happened. This occurred about two years ago. Witness conversed alone with Roberts. Plaintiff was not there. Witness has stated all he knows that will benefit defendant.

Cross-Examined.—He does not recollect that anything was said to him about harness when he received the money and was sent to the repository. Witness does not recollect any conversation in his presence about harness. Witness was requested to call and pay what defendant owed, without specifying any items of indebtedness on the subject, so far as witness remembers. He did so, and has given the result above in his answers. He knows nothing more.

Answers subscribed and sworn to, 16th day of October, 1857.

George I. Pitts examined by commission:

1st. He knows the parties.

2d. He knows that Heard bought a rockaway and harness from McKee, which this suit was brought for,and saw Heard pay some of the purchase money, but does not recollect amount paid. It was a little over three years ago, but does not remember the month or date. He also answers, that he paid McKee one hundred and fifty dollars on this debt, on the 31st of October, 1853, and the trade was made two or three months previous. [Heard told him sometime after he had paid the one hundred and fifty dollars, that he only owed a balance of forty dollars, and he handed him that amount to pay for him, and he sent George Gullen up to pay the forty dollars, which was sent back to him, and Gullen told that all was paid, and Heard owed nothing.]

This portion from *Heard* to *nothng* was marked by plaintiff's counsel when the interrogatories were tendered to him; the returned them to defendant's counsel saying, I object to some evidence and have marked it. When defendant's counsel came to this, plaintiff's counsel objected, saying, it was the declarations of Heard, and claiming he could not make testimony for himself. Defendant's counsel read all within the marks as above, for the ear of the Court, and (as he understood it,) the Court ruled it out. Defendant's counsel excepted. That was about two years ago; Joseph A. Roberts was the clerk. Sometime afterwards, Roberts told him, Heard did not owe the forty dollars, but owed one hundred and ninety dollars.

3d. He has told in his former answer, all that he knows about this case.

Cross-Examined.—1st. He has stated all that he knows in relation to the case in his answers to the direct interrogatories.

Defendant then introduced the depositions of *Joseph A. Roberts*, first taken by plaintiff, by commission:

1st. I know the parties.

2d. I have looked on the annexed bill of particulars, and know that the articles therein specified were sold by me as agent of Hockley C. McKee to defendant. The sale was made July 9th, 1853. I was clerk and agent for plaintiff at that time. The price agreed to be paid for rockaway, harness, &c., was three hundred and forty dollars. Said articles were worth the price charged for them at that time. (The bill of particulars was the same sued on.)

3d. On the morning of the sale, George C. Heard called on me in company with George I. Pitts, and stated that he wanted to buy a rockaway and harness, and he wanted me to put them down low, as he would pay cash for them. I did so, with the expectation of receiving the cash. After the price was agreed on, Mr. Heard left, and in the evening of that day, sent for the rockaway. harness, &c. I sent it down to Pitts' stable, and in a short time afterwards, I went down to see Mr. Heard, but he had left. George I. Pitts asked, if he had not paid for the rockaway. I told him he had not. Pitts said he supposed he had forgotten it, but it was all right, that he would pay for it, but if he did not, that he

Pitts would. I did not see Mr. Heard till the 10th of October following. He then came and bought a set of double harness, for which he paid me forty dollars in cash, as shown by entries in my cash book, made at that time. I mentioned then about his paying for the rockaway. He then told me that Hatcher & Pitts would pay for it, as they had money of his in their hands, and thought they had done so already, and seemed surprised, that it was not done. I then carried the bill to Hatcher & Pitts, and they told me they had one hundred and fifty dollars in their hands, which they paid on the 31st of October, 1853, for which I gave a receipt. The balance is unpaid, one hundred and ninety dollars, with interest from sale.

Cross-Examined.—1st. I made no agreement to take any claim on Hatcher & Pitts at the time of the sale. They however subsequently, on the 1st day of October, 1853, did pay me one hundred and fifty dollars for George C. Heard, and for which I gave them a receipt. George C. Heard has not paid the one hundred and ninety dollars still due, but said in October, when I saw him, that Hatcher & Pitts would pay the whole amount, which they refused to do, saying they had not that amount of his in hand.

2d. I sold to George C. Heard on the 2d of Oct., 1853, a set of double harness, for $40 for which he paid me at that time. Subsequently he sent, by some one, forty dollars to pay for said harness, during my absence, as I learned on my return. He was then informed that he owed for no harness, he having paid for them at the time of the purchase. I have never given any receipt for the one hundred and ninety dollars, it never having been paid me.

3d. Plaintiff has stated in my presence that he has paid it. But from the entries on my books, and of my own knowledge, I am certain it has not been paid.

Sworn to, 11th November, 1856.

Defendant next proposed to introduce *Cornelius P. Marchman and Hilliard J. Hightower*, for the purpose of proving that the dwelling of defendant was burned down a short time previous to the bringing of this suit, and all of his papers, notes, receipts, &c. were burned up, for the purpose of accounting for not producing a receipt for the money, and moreover to have its force as a circumstance in the scale of testimony. The Court rejected the testimony, there being no evidence that there ever had been such a receipt, and defendant excepted.

Defendant closed.

In the argument of the case to the jury, plaintiff's counsel in his closing speech, was proceeding to argue a portion of the testimony of George I. Pitts, marked above, to the effect, that Heard gave to Pitts and Pitts gave to Gullen forty dollars to offer to plaintiff. Defendant's counsel objected to reading any part of the same, unless all went in evidence. Plaintiff's counsel persisted in reading that portion of the same, which testified to the act of Heard, Pitts and Gullen, which the Court permitted, remarking he had only ruled out the sayings of Heard.—[This was in effect, a motion to rule out.]

The Court had ruled out only the sayings of Heard, that "he only owed a balance of forty dollars;" that being the only part objected to, and the rest of the clause being admitted without objection on either side. Nor was the attention of the Court called to any fact accompanying these words, nor any suggestion made that they were necessary to explain any fact, or that they formed a part of the *res gestæ*. The point was raised, and the decision made on these isolated words.—[Inserted by the Judge.]

The Court among other things, charged the jury what was necessary to be done by plaintiff to make out his case, and that if he had done this, he was entitled to recover whatever balance of his account remained unpaid with costs of suit. But that if they believed from the testimony that the account had been paid by the defendant or any one else for him, they would find for the defendant, with costs of suit. The particulars of the charge are not remembered, as no specific error was complained of, and no particular part excepted to.

The jury retired, and brought in a verdict for the plaintiff, and the defendant moved a new trial.

1st. On the ground that the Court erred in overruling the exceptions to the execution and return of the interrogatories of Jos. A. Roberts, and also in overruling the motion to reject them as testimony.

2d. That the Court erred in ruling out that part of the answers of George I. Pitts marked above, and in ruling out any portion thereof.

3d. On the ground that the Court erred in permitting the acts of George I. Pitts and Gullen, to be read to the jury by plaintiff's counsel, in his concluding speech, as also the act of the defendant, at the same time excluding the declaration of the defendant, accompanying and explaining the act as set forth above.

4th. On the ground that an inadvertent error and misunderstanding occurred during the trial of said case, fatal in itself to the administration of justice in the case.

5th. On the ground that the verdict of the jury was contrary to law and to evidence, and that the Judge's charge was contrary to law.

The Court refused to make the *rule nisi* absolute, and overruled the motion for a new trial, and defendant by his counsel excepted, and assigns the same as error.

Benj. H. Bigham, for plaintiff in error.

Ferrell, *contra.*

By the Court.—Lumpkin, J. delivering the opinion.

[1.] The first objection in this case is, to the execution of the interrogatories of Joseph A. Roberts: and this objection is two-fold; first on the ground that the cross interrogatories are not answered; and, secondly, because they were executed in concert with plaintiff's counsel, and upon instructions given by him.

The first ground, we think is not supported by the facts. In the opinion of the Court, the two cross-questions propounded to the witness, were substantially answered. As to the second objection, it seems, that the witness was twice examined by commission in this case. And Mr. Russell, who it is alleged, was counsel for the plaintiff, furnished the witness with a copy of his answers to the first set of interrogatories. We see nothing wrong in this. The object in taking testimony is, to ascertain truth and not to entrap witnesses.

[2.] The next exception is in allowing the witness Roberts to testify that plaintiff said, that Heard had not paid for the rockaway and harness. The interrogatory to which this answer was given, is not in the record. And it depends upon that, whether or not, the answer was legal; unless elicited by the question, it was not proper. It does appear from the bill of exceptions, that the witness was asked, whether or not he ever heard plaintiff say, that Heard had paid for the rockaway and harness? In answer to this, he responded, "he never did," but on the contrary, "he had heard him say, that he had not."

Suppose the question to be, "did you ever hear plaintiff admit, that defendant had paid for the rockaway and harness; state particularly all you heard him say upon the subject?" To the question thus propounded, the reply would have been legitimate, and in the absence of the interrogatory, it is right to presume in favor of the judgment of the Court, that the answer was justified by the question. And this presumption is strengthened from the fact, that the assignment of error is not made a ground in the motion for a new trial.

[3.] Defendant proposed to prove by two witnesses to-wit:

Marchman and Hightower, that his house containing all his papers, was burnt about the time this action was brought; and this he proposed doing, by way of accounting for his failure to produce a receipt from the plaintiff. The Court very properly rejected this testimony for the reason, that Heard did not show that he ever had a receipt. All the proof leads to the contrary conclusion. A receipt was given for the $150 paid for Heard by Hatcher & Pitts; and that is proven by Roberts, the plaintiff's witness, and is no where controverted. No one ever saw or heard of any other receipt, so far at least as the record discloses. In the statements of the witnesses, and of Heard himself, that he had settled for the rockaway and harness, no reference was ever made to a receipt.

[4.] As to the sayings of Heard, that he only owed a balance of forty dollars, we are clear, that this proof was properly execluded by the Court.

[5.] We hold the Court was right in ruling out a portion of the answers of George I. Pitts. It was hearsay evidence.

[6.] The acts of Heard and of Pitts and Gullen, while acting as his agents, were properly submitted as testimony to the jury. Their declarations not connected with these acts, nor explanatory of them, should have been excluded.

As to the fourth ground in the motion for a new trial, that "an inadvertent error or misunderstanding occurred during the trial of the case, fatal in itself to the administration of justice in the case," we are unable to understand it; and counsel representing our absent brother, Bigham, has failed to enlighten us, respecting it.

We concur fully with the Circuit Judge, that the verdict in this case, is neither contrary to law or evidence, but in accordance with both.

The testimony of Roberts is corroborated by his acts, and the books of the plaintiff. The evidence on the other side, is vague, confused and contradictory. The witnesses have confounded the payment for the double harness, with a supposed payment for the rockaway and harness. When Hatcher & Pitts paid to plaintiff the $150 on account of Heard, they excused themselves for not paying the balance of the claim, not because it was already paid, but for want of funds of defendant's in their hands. When was the $190 paid? By whom? No witness has supplied any satisfactory proof upon this vital point. We apprehend none such exists.

Judgment affirmed.

John Robinson, adm'r., plaintiff in error, vs. Mark. A. Hardin, ex'or., defendant in error.

Where an answer is responsive to the bill, and denies its allegations, there can be no decree for the complainant unless the answer is overcome by two witnesses or one witness and corroborating circumstances. To this rule there are many exceptions. The answer may be contradicted by circumstances alone, and in various other ways. It is overthrown by the patent, palpable and self-evident clerical mistake in the terms of this deed.

In Equity, in Cass Superior Court. Tried before Judge Trippe, March Term, 1858.

On the 11th day of January, 1834, William Harden sold to George M. Lavender lot of land Number 38, in the 22d district of originally Cherokee now Floyd county, and executed to him a deed therefor, the clause of warranty in which reads as follows.

" To have and to hold the said tract of land, and all and singular, the premises and appurtenances thereunto belonging as aforesaid, and every part thereof, unto the said George M. Lavender, his heirs and assigns, to the only proper use, benefit and behoof of the said George M. Lavender, his heirs and assigns, forever, and the said *George M. Lavender* for himself and his heirs, the tract of land and premises aforesaid, and every part thereof, unto the said G. M. Lavender, his heirs and assigns, against him the said William Hardin and his heirs and all and every other person and persons whomsoever, shall and will warrant and forever defend by these presents."

John Robinson, as administrator of Lavender, filed his bill in equity against Wm. Hardin, alleging that there was a mistake committed in writing the said clause of warranty in said deed, and prayed the Court to reform the same.

Hardin answered the bill, denying that there was any mistake, and that he never intended to warrant the title to Lavender.

It appeared in evidence, that at the time of sale, the grant to said lot was not taken out.

It was also proved that Hardin had offered to sell said lot of land to other parties, previous to the sale to Lavender, and that after the lot had reverted to the State, and had been granted to a third party, Hardin spoke of settling the case with Lavender.

The Court charged the jury that when the answer is responsive to the allegations in the bill, it requires one witness and corroborating circumstances to overcome it.

Counsel for plaintiff requested the Court to charge the jury, "that it is not necessary, in order to show that there was a mistake, and to correct it, that some witness should swear positively that there was a mistake, but other evidence, if entirely satisfactory, may show a mistake as well as the testimony of a witness. Which charge the Court refused to give, and counsel for plaintiff excepted.

The Court charged "that the jury should take into consideration all the facts and circumstances of the case as detailed by the evidence, viz: the testimony of the witnesses, the deed from Hardin as submitted to them, and if they believed, from the evidence, that a mistake, as complained of, had been made in the clause of warranty, then they should find for the plaintiff, and decree that the deed should be reformed so as to correct it."

The jury found for the defendant, and counsel moved the Court for a new trial, predicated upon alleged error in the charge of the Court; and because the verdict was against the law and evidence of the case.

The Court refused the new trial, and counsel for plaintiff excepted.

Aikin; and Printup, for plaintiff in error.

Underwood; and Shropshire, *contra.*

By the Court.—Lumpkin J. delivering the opinion.

Our judgment is, that a new trial should have been granted in this case.

While the Court, in its charge to the jury, stated the rule of law correctly as an abstract proposition, still it was not the law applicable to the facts of this case. Moreover, by refusing to charge the law as requested by complainant's counsel, and which was applicable to the proof, the jury were probably misled, and induced to believe that unless the mistake in the deed was established by two witnesses, or one witness and corroborating circumstances, their finding should be for the defendant.

The verdict, at any rate, was strongly and decidedly against the weight of evidence. There is scarcely any amount of testimony that could induce the mind to believe that there was not a clerical mistake in drafting this deed. The idea that Lavender, the vendee, should be made to warrant the title against the claim of himself or his heirs, is preposterous. Nobody believes it. Hardin supposed the land was granted, and that he held the title; for he offered to sell to others before he sold to Lavender. It is also to be inferred that he thought he had warranted the title, and that he was bound to make it good, for he spoke of the arrangement he had made to settle with Lavender. And it was not until he ascertained that the mistake existed in the words of the warranty, that he refused to make compensation.

It is alleged, by way of defence, that Lavender was to grant the land before the conveyance was to be executed by Hardin. This may be so. How this can be reconciled with the fact that he has actually made a deed, it is not for us to determine.

Judgment reversed

ALLEN F. OWEN, adm'r. &c., plaintiff in error, vs. NATHANIEL F. WALKER, ex'or. &c., defendant in error.

W. dies leaving O. and W. his executors. O. qualifies, and after acting for six years, dies; when W. qualifies. The administrator of O. prefers a claim under the Act of 1847 for *extra services* rendered to the estate of W. by his intestate in superintending plantations and negroes.

Held, That W., the acting executor, at the time the claim for compensation is made, is the proper party to dispute the demand and litigate it before the Courts.

Motion to dismiss appeal, in Upson Superior Court. Decided by Judge CABANISS, May Term, 1858.

Allen M. Walker died, appointing Jesse L. Owen and Nathaniel F. Walker his executors. Jesse L. Owen qualified in 1849, and took charge of the estate and continued in possession thereof until 1855, when *he* died. The estate consisted principally of two large plantations and negroes, which were managed by the said executor for the benefit of the minor children. Allen F. Owen became the administrator of Jesse L. Owen.

After the death of Jesse L. Owen, Nathaniel F. Walker qualified as executor under the will of Allen M. Walker, and assumed the control and management of said estate.

Allen F. Owen, as the administrator of Jesse L. Owen, filed his petition to the Court of Ordinary of Upson county, asking the Court, among other things, to allow the said Jesse L. Owen extra compensation for services rendered in the management of the estate of Allen M. Walker.

At the January Term, 1858, of said Court of Ordinary, the case was carried to the appeal by consent of Allen F. Owen as administrator of Jesse L. Owen and Nathaniel F. Walker as executor of Allen M. Walker.

At the May Term, 1858, of Upson Superior Court, the cause came on to be heard, when counsel for Nathaniel F. Walker moved to dismiss the appeal on the ground that he was an improper party to the case; he having qualified as executor of Allen M. Walker since the death of Jesse L. Owen.

The Court sustained the motion and dismissed the appeal, and counsel for Allen F. Owen, administrator, excepted.

Stubbs & Hill, for plaintiff in error.

Smith, *contra*.

By the Court.—Lumpkin J. delivering the opinion.

Allen M. Walker died in 1849, leaving Jesse L. Owen and Nathaniel F. Walker his executors. Owen alone qualified, and under the Act of the Legislature passed in 1847 [*Cobb* 337] kept the negroes of the deceased together, and worked them upon the plantations of the testator until 1855, when Owen, the executor, died. Nathaniel F. Walker then came forward and was qualified as executor of Allen M. Walker's will. Allen F. Owen was appointed administrator of Jesse

L. Owen; and in that character applied to the Ordinary to have compensation made to his intestate for the six years that he had managed the agricultural property of Walker, his testator. Nathaniel F. Walker appeared and contested the claim. By consent the case was appealed to the Superior Court, and was there dismissed on the ground that the acting executor was not a proper party to enter the appeal, and conduct the litigation. And to reverse this judgment, this writ of error is prosecuted.

The Act of 1847 provides that "the parties in interest" may contest the reasonableness of the allowance claimed by the trustee for his extra services. And the only question made in the record is, who is the party in interest in this case to defend this proceeding? But for the decision of Judge Cabaniss, who is not only a very clear-headed man, but who has much experience in the business of the Ordinary concerning all matters relating to testates' and intestates' estates, and the earnest argument in support of it by our learned brother Smith, a doubt never would have occurred to us, but that the acting executor is the party in interest whose privilege and duty it is to resist this application.

Usually where the executor, administrator, or guardian applies, the legatees or next of kin are of course the persons to resist the claim. There is no one else to do it. But here the former trustee who rendered the service is dead, and another representative has been qualified. The interest of the administrator of the deceased executor and the survivor who has qualified since the death of his co-executor, are not only not co-incident, but antagonistic. It is obligatory upon Nathaniel F. Walker to protect the estate of his testator against this and all other demands, the justice of which he disputes, or at any rate desires to see established. Why not this as well as any and all other claims? Does he not represent the legatees as well as the estate generally? Why make an exception in this case? Why thrust the legatees forward to defend against this any more than any other suit?

If minors, as probably they are, who is most likely to best represent them—the executor selected by their father, or a guardian *ad litem* appointed by the Court? When a sole trustee is the applicant from the necessity of the case, the next of kin must come forward because their interest *quo ad hoc* is opposed to that of the trustee, and there is no one to represent them. But not so in the present case; and the law should not be so interpreted.

Judgment reversed.

ANDERSON HUDGINS, plaintiff in error, vs. The STATE OF GEORGIA, defendant in error.

[1.] Where a slave disappears from the possession of his owner, and is found in the custody of the defendant, who feloniously removes or sends him out of the State to be sold, he appropriating the proceeds, the presumption of law is, that he was stolen from the residence of the master, and the burden of proof is upon the accused to establish the contrary.

[2.] All that the accused says at the same time is testimony; still the jury are not bound to believe all his confessions to be true.

Indictment for larceny. Tried in Monroe Superior Court before Judge CABANISS, February Term, 1858.

Anderson Hudgins was indicted in Monroe Superior Court for stealing a negro man slave, the property of one John D. McCowen, who lived in said county of Monroe.

It appeared, in evidence, that the negro man was last in the possession of McCowen on the 18th day of February, 1854, in Monroe county. He left on the night of that day, and was traced to the possession of the defendant on or near the line of Newton and DeKalb counties.

There was much evidence introduced, which it is unnecessary to set forth.

The jury found the defendant guilty, whereupon his counsel moved for a new trial on the ground that the verdict was contrary to evidence.

The Court overruled the motion, and counsel for defendant excepted.

HAMMOND & SON, for plaintiff in error.

Sol. Gen DANIEL; and PEEPLES, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

[1.] The defendant being convicted of the larceny of a slave, moved for new trial on several grounds, but has abandoned all but one—namely, that the verdict was contrary to the evidence in this: that it does not appear that the negro was stolen from the county of Monroe, where the offence was alleged to have been committed.

The owner of the slave lived in Monroe. He disappeared from the possession of his master in that county without his permission. He was found in the possession of the accused, who lived near the line of Newton and DeKalb counties. He has not been seen since. The defendant confessed that he was taken off from his house and sold in Tennessee by a cousin of his, with his consent, and knowing him to be the property of McCowen; he, too, to share the proceeds of the sale. Defendant stated, to be sure, that the boy came to his house. But when told that McCowen believed that he carried off the negro from Monroe, he did not deny it, but replied by the guttural ejaculation, Humph! which interpreted, means, I take it: it may be so, but prove it if you can. The negro had belonged to defendant's father, who lived in the county of Monroe and was hung for murder in that county. I mention this, not by way of reproach to the living or the memory of the dead, but to show the previous relations subsisting between the accused and the slave, and the facility the former had for enticing him away. The slave left McCowen without cause or provocation to do so.

[2.] We take the law to be this. That when a slave disappears from the possession of his owner and is stolen, the presumption is, that he is taken from the possession of the owner, and from the place of his residence, and it is incumbent on the prisoner, in whose custody he is found, to prove the contrary. And in this case, the evidence would warrant the jury in finding that such was the fact. For while it is true that all that the defendant said is testimony, still the jury are not bound to believe that all he said is true.

That the prosecutor's slave has been stolen and lost to him, and that defendant participated in the theft, is not denied. Whether he carried him off personally from Monroe, or induced him to run away and come to him, is a very small matter. We hold that the Court was right in refusing a new trial in this case.

Justice to our feelings requires us to say that we approve of the commendable and disinterested zeal manifested by the counsel of this unfortunate man.

Judgment affirmed.

WM. KILE, plaintiff in error, vs. JOSEPH E. THOMPSON, adm'r, &c., defendant in error.

Where a verdict has been inadvertently rendered in a common law action, which is restrained by injunction, the Court need not set aside the verdict, but suffer it to stand—restraining all further proceedings under it, until there can be a hearing in the equity cause, unless, in the mean time, the injunction is dissolved.

Motion to set aside verdict, and for new trial, in Fulton county. Tried before Judge BULL, April Term, 1858.

Pending an action of ejectment, William Kile, tenant in possession of a certain lot in the city of Atlanta, filed, on the 9th July, 1857, a bill for relief, discovery and injunction, against Joseph Thompson, adm'r, et al. Said bill was sanctioned, enjoining said action of ejectment, and a copy served personally upon the defendant, Thompson, 2d September, 1857.

At October Term, 1857, the action of ejectment was called, and defendant by his counsel moved to continue—having stated in the showing for continuance, that there was a bill pending touching the same matter, between the same parties, but said nothing about the injunction having been sanctioned and served. He was forced to trial for want of a good showing, and a verdict obtained against him.

Defendant in ejectment was represented by A. W. Hammond & Son, but A. W. H. had left the court-house. Immediately after the verdict was rendered, the Court adjourned to dinner. A. W. Hammond met the counsel of Thompson at the door, and when informed what had been done, remembered that the ejectment had been enjoined. Immediately after dinner, counsel for defendant moved to set aside the verdict, and for a new trial. The papers showed the injunction, &c., as before stated. A. J. Hammond stated that the facts had not occurred to him at the time of the trial; counsel for Thompson stated that they did not know of the bill of injunction, or of any bill; their clients had not apprised them of any. The motion was directed to be put upon the motion docket, to be heard in its order. Upon the calling of said motion at April Term, 1858, the Court refused a new trial, or to set aside the verdict—thinking this not the proper remedy; and an order discharging said motion was entered on the minutes. Whereupon, counsel for plaintiff excepted and assign error.

HAMMOND & SON, for plaintiff in error.

COOPER & BLECKLEY, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

We see no reason for setting aside the verdict in this case. Let it stand. Still, no attempt should be made, under the circumstances, to enforce it, until a final hearing under the bill, unless the Chancellor should, in the mean time, dissolve the injunction. In many cases, it would be better to suffer common law cases to progress to judgment before the injunction operates. It would prevent conflicting liens from being acquired, which would thereby obtain a priority to which they are not entitled, on account of the improper delay resulting from an injunction which should not have been granted.

Judgment affirmed.

JNO. N. WEBB, plaintiff in error, vs. WM. CAMP, defendant in error.

[1.] In an action brought, to recover land, the defendant claimed by a purchase at Sheriff's sale, under a *fi. fa.* which, at the time of the sale, had upon it, an entry three years old, to the effect, that money sufficient to satisfy the *fi. fa.*, had been raised by the Sheriff, and that, "after taking commissions, the balance of the money," had been "paid over to older *fi. fas.*"

Held, That, notwithstanding the generality of this entry, it was not to be presumed, as against the purchaser at the sale, that the *fi. fa.* was paid off.

[2.] The statute of the 32d, Henry the 8th, against bracery and the buying of titles, is not of force in Georgia.

Complaint for land, in Catoosa Superior Court. Tried before Judge ————, at———— Term, 1858.

The facts of this case are fully stated in the opinion of the Court.

Spraybebry, for plaintiff in error.

Hackett, *contra.*

By the Court.—**Benning** J. delivering the opinon.

Jno. N. Webb brought an action againt Wm. Camp, to recover lot of land, number 58, in the 28th district, and 3d section, in Catoosa county. The action was in the form authorized by the Act of 1847, "to simplify and curtail pleadings at law."

It appeared, that one Green D. Sims was the drawer of the lot, from whom, Webb had a deed for the lot, and that Camp was in possession. This was Webb's proof.

A *fi. fa.* from Stewart Superior Court, in favor of George Young against Green D. Sims, with its entries, was read in evidence to the jury, by Camp.

Among the entries, was one dated the 27th of November, 1849, to the effect, that the lot had been levied on as the property of the defendant, Sims; and another dated the 2d of January, 1849, to the effect, that the lot had been sold under this levy, for $20.

Camp also introduced a deed made by the Sheriff, to Presley Yates, corresponding with this last entry.

Among the entries on the *fi. fa.*, were also two others earlier; viz, one dated the 20th of August, 1845, to the effect, that the *fi. fa.* had been levied on four negroes, the other, an entry in the following words:

"The above levy," (i. e. the one on the negroes,) "sold on the first Tuesday in July, 1846, for nine hundred and sixty-six dollars, and, after taking commissions, the balance of the money, paid over to older *fi. fas.* JOHN V. PRICE, Sheriff."

When this *fi. fa.* was offered in evidence, it was objected to by Webb, on the ground; "that the same appeared to have been paid off; that the Sheriff of Stewart county, John V. Price, had sold negroes, and raised the sum of nine hundred and sixty dollars, in 1846, (long before the land in dispute was levied on,) on said *fi. fa.*, and had not shown, sufficiently, what was done with said money." The objection was overruled, and that was excepted to.

The Court charged the jury, that if Camp, the defendant, was in the adverse possession of the land, at the time the plaintiff's deed was made, that that deed was void, under the Act of Henry the 8th. To this charge, Webb excepted.

The jury returned a verdict for the defendant, and the plaintiff moved for a new trial, making the two decisions aforesaid, the grounds of the motion. The Court overruled the motion, and that was excepted to.

Was the Court right, in overruling the objection to the *fi. fa?*

We think so.

The general principle is, that a Sheriff's entries of this kind, are, at least, *prima facie* evidence. True, this entry was very general; but not more so, perhaps, than such entries usually are.

The case differs in several respects, from *Harrison and others vs. Thompson*, (9 *Ga. R.* 310.)

In that case, the entries made the whole of the money go, in "costs;" i. e. go to the Sheriff himself,—a suspicious thing. In this, the entry makes the money, less "commissions," go to older *fi. fas.*,—far less suspicious. In that case, the attack on the entries, was direct; the defendant in the *fi. fa.*, moved to have it entered, satisfied. Here was notice to the other side, and a fair chance to defend. In this case, the attack on the entry, is collateral,—it comes by surprise, and does not give a fair chance to defend.

In that case, the controversy was between all the parties in interest; and the parties in interest, were original parties; viz: the plaintiff, and the defendant, in the *fi. fa;* in this case, the controversy is not between all the parties in interest; the plaintiff in the *fi. fa.*, the person perhaps, most deeply affected of any, by the entry, is not a party; even the defendant in the *fi. fa.*, himself, is not a party; the parties are two persons who both claim under the defendant in the *fi. fa.*, Webb, doing so, directly, he holding the defendant's own deed; Camp doing so, indirectly, he holding the Sheriff's deed; and of these two, Camp has the better equity; for he bought first, and when he bought, the entry had been standing for three years—from 1846, to 1849,—without objection from the defendant in *fi. fa.* Therefore, when he bought, he had sufficient ground for inferring, that the entry was not incorrect; he might well say: if this entry is not objectionable to the defendant in the *fi. fa.*, why should it be, to any body else.

Indeed, it does not appear, that Sims, the defendant in the *fi. fa.*, objects to the entry to this day. He has filed no affidavit of illegality.

[1.] The Court was right then, we think, in admitting the *fi. fa.*

[2.] But, we think, that the Court erred in its charge, as to the statute of Henry the 8th.

A majority of this Court think, the 32 of Henry the 8th, against bracery and the buying of titles, not in force, in this State. See *Cain and Morris vs. Monroe*, 23 *Ga. R.* 82.

New trial ordered.

William Lauham, plaintiff in error, vs. James Vaughan, defendant in error.

The Sheriff levies a *fi. fa.* in time to make the money by the last sale day before the Court to which it is returnable. He turns the process over to his successor, and goes out of office. An affidavit of illegality is interposed, which arrests the execution.

Held, That the Sheriff is not liable to be ruled for the money.

Rule against Deputy Sheriff, in Cass Superior Court. Decided by Judge Trippe, March Term, 1858.

William Lauham obtained judgment against E. W. Attaway, Thomas J. Dodd, and A. G. Caldwell. *Fi fa.* was issued and placed in the hands of James Vaughan, Deputy Sheriff of Cass county.

At the March Term of said Court, Lauham moved a *rule nisi* against Vaughan, calling on him to show cause why he should not pay over the money on said *fi. fa.* The Deputy Sheriff filed his answer, in substance, as follows.

"That he levied the *fi. fa.* on property of the defendants sufficient to satisfy the same, on the 19th day of January, 1858. That his term of office expired before the day of sale, and that he turned over the *fi. fa.* with the levy thereon to his successor in office, the present Sheriff."

It appeared that Dodd, whose property was levied on, filed an affidavit of illegality, on the ground that the Sheriff, Vaughan, had neglected to levy the *fi. fa.* on property of the principal in *fi. fa.*, who afterwards removed from the county.

The Court dismissed the rule, and counsel for plaintiff excepted.

Milner & Parrott, for plaintiff in error.

Wofford & Crawford, *contra.*

By the Court.—Lumpkin J. delivering the opinion.

This case is encumbered with matter, which has nothing to do with it. Lauham got a judgment against Attaway as maker, and Dodd & Caldwell as endorsers. The execution was issued and placed in the hands of James Vaughan, the Deputy Sheriff, to make the money. Dodd, one of the defendants, pointed out property of Attaway to be levied on. Vaughan, on account of other business in his hands, did not make the levy. On the 19th of January, 1858, he levied the *fi. fa.* on the property of Dodd, in time to raise the money by the next Term of the Court to which the *fi. fa.* was returnable, and turned over the execution to his successor in office. Dodd filed an affidavit of illegality upon the ground that Attaway, the principal, was primarily liable, and thus arrested the sale. Is Vaughan subject to be ruled?

The Court below thought not, and so we think. · He did levy in time to make the money. Had he levied sooner, the same obstructions would have been interposed. The plaintiff was not bound to pursue any one of the defendants. Neither was the Sheriff. It is not disputed but that Dodd is good. There is no merit, it is true, in the illegality. Vaughan is not punishable for that. Had the levy been delayed too late for the last sale day before Court, this frivolous defense would not have protected the officer. Plaintiffs must be protected from collusive combinations between Sheriffs and defendants. But this is not that case. If any one is liable, it is the incoming, not the outgoing officer. But we apprehend he is not. He was compelled to receive the affidavit, or at any rate to judge of its validity, at his peril. We express no opinion upon this point.

Judgment affirmed..

WILLIAM C. FAIN, plaintiff in error, vs. ROBERT H. JONES, and ROBERT H. WILLIAMS, partners, defendants in error.

When the verdict is contrary to the evidence, a new trial will be granted.

Complaint, in Fannin Superior Court. Tried before Judge RICE, at ———— Term, 1858.

The facts are stated in the opinion of the Court.

FRANCES, for plaintiff in error.

WALKER, *contra.*

By the Court.—BENNING J. delivering the opinion.

Jones & Williams sued Wm. C. Fain, for $140, for a buggy sold and delivered to him.

He pleaded *non assumpsit*, and a partial failure of consideration in this; that, when he bought the buggy from Jones & Williams, they warranted the buggy to be of good material, and built in a good and workmanlike manner; and that, in fact, the buggy was not of good material, or built in a good and workmanlike manner; but, that one of the hubs and coupling (a word I cannot make out,) gave way, before the buggy was run two days, and before Fain had reached home with it; to his expense, $50.

Philip D. Claiborne, one of the witnesses for Jones & Williams, testified, that he, as their agent, sold Fain the buggy for $140, and told him that Jones & Williams warranted its material and construction, for twelve months, with ordinary care, and that if said buggy gave way within twelve months, he, as agent for them, would pay for the repairs; that he saw the buggy, at their house, in August, 1856, directly after the same was purchased; that one of the fore wheels was "bursted" in the hub, and banded, and temporarily wedged up; that he saw a part of the wood that came out of the "bursted" hub, and that he thought it was bursted, in consequence of the hub being made out of a piece of timber that was partly rotten; that he looked upon the buggy to be nearly a three wheeled buggy, and that he thought it would take between ten and twenty dollars to repair the same; and thought that Jones & Williams would charge that amount, to repair the same.

It was proved by another witness, *Ebenezer Fain*, that he employed a workman, to fix one of the fore wheels of the buggy, the box of which wheel, had become fast on the axle, and was turning in the wood, as the hub; and he had some screws fixed; and, after said repairs, took the buggy to W. C. Fain; that the work done on the buggy, cost $1 75.

The jury found a verdict for Jones & Williams, for $138 50, besides interest.

A motion was made for a new trial, on the assumed grounds, that the verdict was contrary to law; contrary to the evidence and to the weight of the evidence; and that the Court erred in charging the jury: that, if the contract was, that the plaintiff warranted the material and construction of the buggy for twelve months, and, that, if the buggy failed from defect of material or construction within the twelve months, the defendants should have it repaired, and plaintiff would pay the expense of the repairing; then, it was incumbent on the defendant, to prove, that the buggy failed within the twelve months, and the particulars wherein it failed, and what the expense of repairing the buggy was; and defendant would, then, be entitled, to have the expenses deducted from the price of the buggy.

The Court overruled the motion, and that was excepted to.

Claiborne's testimony shows, that the hub was *rotten*. His testimony stands uncontradicted. And his opinion was, that the defect was one which depreciated the value of the buggy, by from $10, to $20.

The jury allowed only $1 50. They, doubtless, going upon the testimony of Ebenezer Fain, who said, that the work which he caused to be done on the buggy, cost $1 75. But that work may have been but the temporary repairing to which, Claiborne himself referred as done when he saw the "bursted" wheel, and formed his estimate of the extent of the injury. Manifestly, $1 50 is not sufficient to replace a rotten hub.

We think, then, that the jury ought to have deducted, at least $15 from the price; and, that, as they only deducted $1 50, there must be a new trial, unless Jones & Williams will remit $13 50, from the verdict.

Judgment accordingly.

RRYAN W. COLLIER, plaintiff in error, vs. THOMAS M. HARKNESS et al. defendants in error.

[1.] It is no ground for relief in a Court of Equity, that the vendee of real estate has got worsted in the contract. He must have been defrauded, and that, too, after using reasonable precaution on his part to guard against imposition.

[2.] A contract for the sale of land will not be set aside by the mere false assertion of the vendor as to the productiveness of the property, especially where no rescision has been applied for.

[3.] A *bona fide* purchaser, without notice, will be protected against the vendor's lien.

In Equity, in Butts Superior Court. Tried before Judge CABANISS, June Term, 1858.

In November, 1853, Bryant W. Collier purchased, from Augustus Cargile, then of Butts county, since removed from the State, three hundred acres of land, on which there was a grist and saw mill, for which he agreed to pay him $8,000 as follows: One note for $2,000 payable 18th November, 1853; one note for $2,000 payable 18th November, 1854; one note for $2,000 payable 18th November, 1855, and one note for $2,000, payable the 18th November, 1856. The three first notes Collier paid at maturity. Thomas M. Harkness brought suit on the last note, and obtained judgment in the Inferior Court, from which Collier entered an appeal, pending which he filed his bill, alleging the above facts, and further, that he was induced to purchase said land; from the false representations of Cargile as to the value of the mills.

The bill also alleged that at the time of the sale, Cargile did not have a good title to the land, the purchase money not having been paid to Hartwell Tarver, from whom he bought it.

That Harkness, the holder of said note, was cognizant of these facts at the time he purchased said note from Cargile, and for which he paid but a nominal sum.

The bill prayed for an injunction to restrain and enjoin Harkness from prosecuting the common law suit; and that he might be allowed a reasonable deduction from the amount of the purchase money agreed to be paid for the land, on account of the deficiency in said mills.

The defendant, Harkness, filed his answer, stating that at the time of the sale of the premises by Cargile to Collier, he had title to all the land except from about thirty to seventy acres of the land which he had bought from Hartwell Tarver; and on this part of said tract of land, the mills are not situated.

The defendant came to the possession of the note by his intermarriage with his wife, who had the note at the time, and which was not due, and for which she had paid Cargile a fair and valuable consideration.

At the hearing of said bill and answer, the Court dissolved the injunction, and counsel for complainant excepted.

BAILEY, for plaintiff in error.

LYONS & BOYNTON; and PEEPLES, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

Harkness obtained judgment against Collier on a note for two thousand dollars. An appeal was entered, and pending the appeal, a bill has been filed, praying an injunction against the common law action. Collier amended the bill, making Mrs. Harkness a party. Harkness answered the bill, and moved to dissolve the injunction; which motion was granted, and to this order Collier excepts. Amongst other things, Collier complained that the injunction should not have been dissolved until Mrs. Harkness had answered the bill.

To obviate all difficulty on this account, as well as to relieve the case from the supposed equities in favor of attaching upon the note in the hands of Mrs. Harkness and of her husband, Harkness, we propose to treat the case as though the suit had been brought by Cargile, the payee, against Collier, and the bill had been filed by Collier against Cargile. This simplifies the case very much, and is conceding all that Collier can ask. What, then, would be the equities between the original parties?

The bill, in substance, charges that Cargile misrepresented the profits of the mill, which was the main inducement to make the purchase; and that the complainant has been disappointed in not realizing from it as he had expected to do, the means to meet the payment of the purchase money. We are satisfied that the allegations in the bill do not amount to such a fraud in the sale of real estate as would entitle the purchaser to relief. That the mills are not as profitable under the management of Mr. Collier as he anticipated, does not necessarily show that there was deceit practiced in the sale of this property. Mr. Collier's business is taverning, not milling. And it is quite likely that he is the best customer of his own mill, without crediting it with all that he consumes. Our people are somewhat given to bragging. It is a national characteristic; and no wonder—for they have much to be proud of. It will not do to scrutinize their idle boastings too closely. No one is misled by them, for no one, unless he be decidedly verdant, believes all or even one-half that is said as to the value or productiveness of property. Mr. Collier does not aver very strongly that he was the dupe of his overweening confidence in Cargile. In the sale of property, especially of real estate, which may be seen of all men, the law imposes a duty upon the vendee as well as the vendor. And it refuses assistance to those who have it abundantly in their hands to take care of themselves. Every one who is, *sui juris*, capable of contracting and being contracted with, is his own guardian. And *caveat emptor* is the well settled doctrine of the old common law. Chancellor Kent may well regret that it had not been adhered to. 2 *Kent's Com.*, 485. It would have saved the Courts and the county immense trouble.

But this is not the gravamen of this bill. The main ground upon which relief is sought is on account of the incumbrance or cloud hanging over the title of this property. In response to the allegations in the bill, the answer states fully the facts in this respect. And what are they? That between thirty and seventy acres only of the land were bought by Cargile of the late General Tarver, and that the mills are not on this portion. And even the bill states that since Collier bought, he has heard that the estate of General Tarver threatens to enforce the vendor's lien for the unpaid purchase money. And it is from this quarter the bill charges that danger is apprehended.

If Mr. Collier has only heard this *since he bought*, he is in no peril. Being *bona fide* purchaser, without notice, he is protected, of course, against this vendor's lien, even if it existed, upon any portion of the land as against Cargile.

Suppose it were otherwise, the injunction should only be continued in any view of it for the protection of Collier to the value of the small strip of the land purchased of General Tarver, and the balance of his note he ought to pay. At any rate, the plaintiff should not be restrained from collecting it. But there is no sufficient reason for retaining the injunction at all.

Consequently, we affirm the order of the Circuit Court.

WOOTTEN & GOOLSBY, plaintiffs in error, vs. ABSALOM CALLAHAN, defendant in error.

In Deceit, it is indispensable, that the *scienter* be both alleged and proved.

Deceit, in Floyd Superior Court. Tried before Judge ———, at ——— Term, 1858.

The facts of this case are fully set out in the opinion of the Court.

ALEXANDER, for plaintiff in error.

UNDERWOOD, *contra*.

By the Court.—BENNING J. delivering the opinion.

The declaration contained three counts, one, for a breach of warranty, the other two, for a deceit, in the sale of a negro; but Callahan elected to proceed on the counts for a deceit, which the Court considered, as in effect, a striking out of the count on a warranty.

Of the two counts in deceit, the first alleged, that Callahan bought, of Wootten & Goolsby, a negro woman for $800. They fraudulently representing the negro, to be sound, except a cold, when she had typhoid fever, of which, she shortly afterwards died. The second alleged, that Wootten & Goolsby, well knowing the woman to be unsound and diseased, with fever of a dangerous and malignant nature, and concealing this from him, Callahan, sold the woman to him for $800, and that she, shortly afterwards, died of the fever.

The jury found for Callahan, $775, with interest from the 29th of January, 1853.

Wootten & Goolsby moved for a new trial, putting their motion on the following assumed grounds; 1st, that the Court erred in admitting the testimony of Davis, to vary and add to the bill of sale; 2dly, that the Court erred in refusing to compel Davis, to say for what sum he sold the negro bought from the plaintiff; 3dly, that the verdict was contrary to the evidence, and to the weight of the evidence; 4th, that the verdict was contrary to law; 5th, that the verdict was contrary to the law and the evidence; 6th, that the jury found $775 with interest from the 29th of January, 1853; 7th, that the Court erred in charging the jury, that it was immaterial, whether Wootten knew the representations to be false or not; that if he knew them to be false, it was a fraud in fact, and if he did not know them to be false, it was a fraud in law.

This motion the Court overruled, and that was excepted to.

The only ground relied upon, was the seventh and last, and that, we think, was a good ground.

In deceit, it is indispensable, that a *scienter* be both alleged and proved. *Terrell vs. Bennett,* 18 *Ga.* 404; *Mares vs. Kenyon,* 18 *Ga.* 291; *Chandelor vs. Lopus,* 1 *Smith's Lead. Cas.* 777.

The *judgment,* in *Bennett vs. Terrell,* (20 *Ga.* 83,) agrees with these decisions.

We think, therefore, that this was a ground sufficient to require of the Court to grant the motion.

Judgment reversed

COLEMAN & QUILLIAN, et al., plaintiffs in error, vs. WILLIAM FRANKLIN, guardian, defendant in error.

[1.] An equity cause may be re-heard by petition when it does not appear that the decree has been enrolled.

[2.] The *bona fides* of a conveyance made by an intestate to his infant son, may be enquired into in a bill to marshal assets.

[3.] And it may be enquired into in a county in which the land conveyed does not lie—that county having jurisdiction of the parties.

In Equity. Petition for re-hearing, in Fannin Superior Court. Decision on demurrer, by Judge RICE, at May Term, 1858.

The petition states, that Coleman & Quillian, and others, were made defendants to a bill filed by the administrators of James A. Beard, deceased, for the purpose of marshaling the assets of said estate, the same being represented as insolvent; that said bill further set out the fact, that shortly before the death of the said James A. Beard, he conveyed, without consideration, to his minor son, James H. Beard, a tract of land containing fifty-five acres, being part of lot No. 164, in the 10th district, and 2d section of Gilmer county; that said deed of conveyance bore date 18th August, 1854, and that your petitioners, defendants in said bill, claimed said land as assets belonging to the estate of said deceased, and to be applied to the payment of their debts against the same; and the bill prayed that the defendants (your petitioners) might proceed and have the titles to said land tried and adjudicated.

The petition further states, that a guardian, *ad litem*, was appointed for said minor, James H. Beard, who answered said bill, and admitted that he was informed and believed that said deed of conveyance from James A. Beard to his son, was made shortly before his death, and after the debts of petitioners were contracted.

The petition further states, that at the last Term of the Superior Court of Fannin county, a decree was rendered in said cause, but in consequence and by reason of the absence of the Solicitor who prepared and drafted the bill, no mention was made or notice taken in said decree of the land aforesaid, no testimony was offered in relation thereto, nor any adjudication or disposition had thereof—the same having been wholly forgotten, and overlooked in forming and making up said decree, the same having been drawn up under the direction of the Court, in reference to ascertaining the dignity of the several claims against said estate, and without a knowledge on the part of the Judge, at the time, that the title to said land was in any manner involved.

The petitioners pray that the said decree be opened, and the cause as to the land be re-heard in reference to the title thereof.

To this petition the guardian, William Franklin, by his counsel, demurred and moved that the same be dismissed on the following grounds:

1st. Because the decree was final, and has become a matter of record, and therefore, cannot be disturbed by a proceeding of this sort.

2d. Because the land being situated in the county of Gilmer, is not the subject matter proper to be disposed of in and by said decree, and said bill being filed to marshal the assets of the estate of *James A. Beard*, deceased, and said land not being part of said estate, was not therefore germain to the bill.

3d. Because all questions respecting titles to land, are to be tried and determined in the county in which the land lies, and said decree should not therefore be impeached for omitting to dispose of said land.

After argument, the Court sustained the demurrer, and dismissed the petition, and counsel for petitioners excepted.

D. A. Walker, for plaintiffs in error.

W. Boyd, *contra*.

By the Court.—McDonald J. delivering the opinion.

This was a petition, in the Court below, for the re-hearing of a Chancery cause, in which a decree had been rendered. It was a bill to marshal assets. The defendants' petition was demurred to on the three grounds stated above, and the presiding Judge, on hearing argument, refused the petition and dismissed it.

[1.] There is no evidence in the record showing that the decree pronounced in the cause had been enrolled; and if it has not been, there may be a re-hearing by petition.

[2.] The complainants set out in their bill the conveyance, by their intestate to his infant son, of the land therein mentioned, and ask a decree in respect to it, as it was claimed by some of the creditors that it should be sold as assets. No decree was passed upon it, for reasons assigned in the petition. There can be no objection to investigating the *bona fides* of the conveyance, as the complainants have asked in their bill, in this proceeding.

[3.] There is no constitutional impediment to the trial of the question involved in the issue proposed in the petition for the re-hearing of the bill, in the county in which the bill was pending, not being the county in which the land lies, that Court having jurisdiction of the parties. It is not the kind of case which the Constitution requires shall be tried in the county in which the land lies.

Judgment reversed.

Luke Johnson, and his wife, **Aramanda P. Johnson**, **Moses Meek**, and his wife, **Margaret Meek**, plaintiffs in error, vs. **Margaret Brown**, **James Carmichael**, **James R. Brown** and others, defendants in error.

V. held in his possession, certain negroes, which he had sold and conveyed to the children of B., but he so held them, for those children; after thus holding them for some time, he delivered them to B., saying, take them, and hold them, in trust for your children. B. took them, without objection to holding them for his children.

Held, That B's possession thus acquired, was not adverse to his children's title, and, therefore, that the statute of limitations would not run in favor of it, against their title.

In Equity, in Henry Superior Court.

The case is stated in the opinion of the Court.

Doyal & Nolan; and **Peeples**, for plaintiffs in error.

Glenn; and **Floyd**, *contra*.

By the Court.—**Benning** J. delivering the opinion.

The plaintiffs in error, sued the defendants in error, in equity, for an interest in certain negroes

The defendants, among other things, relied on the statute of limitations in their defence.

It appeared, by the evidence of John Vandergriff, that in July, 1825, he bought the negroes for $,1000, from William Brown, the father of Mrs. Johnson and Mrs. Meek, and kept the negroes in his possession, until about the next January; that, a few days after this purchase, Brown proposed to Vandergriff, that, if he would convey the negroes to his, Brown's children, he, Brown, would give him back the $1,000; that Vandergriff accepted this proposition, and, in accordance with it, made a deed of the negroes to Brown's children; and, that he was directed by Brown, to have the deed recorded; that he and Brown went to the Clerk to have the deed recorded; that he handed the deed to John Hill, the

Clerk, to be recorded; that Brown, soon afterwards, told him to wait, and took back the deed from the Clerk, before it was recorded, and kept it; that, afterwards, when Vandergriff delivered the negroes to Brown, he told Brown, to take them, and keep them in trust for his, Brown's, children.

A part of the charge of the Court to the jury, was as follows:

"If the negroes were delivered, then upon the delivery, they vested in the children of Brown, and vested in Aramanda Johnson, as one of those children, and, through her, in her husband, absolutely; and the statute of limitations, ran against him, and barred him, if his suit was not commenced within four years from the time, his right of action accrued. If no trust was created when the instrument was executed, and it then conveyed an absolute title to the grantees, the grantor could not, afterwards, change the character of the title conveyed, and convert it into a trust."

"If the deed conveyed an absolute title without any trust, an absolute title vested in the children of Brown, and through Aramanda Johnson, in her husband, and they were barred by the statute of limitations, if their suit was not commenced within four years, after their right of action accrued."

Was this charge right?

Vandergriff kept possession of the negroes for some time after the date of the transaction in which, he made a deed for them, to Brown's children, received from Brown the $1,000, in consideration for the deed, and let Brown, take possession of the deed; but he did not keep this possession for *himself;* he kept it for *Brown's children.* This is, plainly, inferable, from his statement to Brown, made when, at last, he delivered the negroes to Brown, which was "to take them, and keep them in trust, for his children." Vandergriff, then, whilst thus holding the negroes, was not holding them, adversely, to these children; and, if he was not, then, the statute of limitations, was not running during this time in *his* favor, against the children. His possession was to be considered, as the childrens' possession.

Now, Brown merely succeeded to this possession of Vandergriff's; when receiving the negroes from Vandergriff, he was told by Vandergriff, "to take them, and keep them in trust for his children." There can be no doubt, that Brown must have understood by these words, that it was expected of him, that he should hold the negroes for his children; and as, he received them without objecting to so holding them, it is to be considered, that he received them, agreeing to so hold them. True, it may be, that there was no technical *trust* created; a trust by which, the legal title passed into Brown, and the equitable into his children; but, what is far short of this, will often be sufficient to prevent the statute of limitations from running. There is no trust between landlord and tenant, principal and agent; (frequently there is not;) and, yet, as long as the relation lasts, the statute does not run in favor of the tenant, against the landlord—in favor of the agent, against the principal. In such case, the possession of the tenant—the possession of the agent, is not adverse, but is, in law, but the possession of the landlord—but the possession of the principal. Wherever the possession of one person, is, in law, the possession of another, it is not a possession that can be made available under the statute of limitations. And such was Brown's possession. It was, in law, the possession of his children.

Whilst, then, this possession of Brown, remained thus the possession of his children, the statute did not begin to run in his favor, against them.

How long did it so remain? Until he conceived the purpose, to change it into a possession adverse to his children, and they acquired knowledge of this change of purpose.

We think, then, that the charge aforesaid, was erroneous; that the Court should, instead of giving that charge, have given a charge to this effect; that if, when Vandergriff delivered the negroes to Brown, he told Brown, to take them and keep them, in trust for his children, and Brown received them without objecting to so hold them, the possession he acquired, was one that was not adverse to his children, and, was one that was not to become adverse to them, until he conceived a purpose that it should become adverse to them, and knowledge of such his change of purpose came to them, and that the statute of limitations does not commence to run in favor of a possession, against the title, until the possession becomes adverse to the title.

So, we think, that there ought to be a new trial.

Judgment reversed.

HENRY ALSTON, plaintiff in error, vs. MATHADIUS M. GRANTHAM, defendant in error.

[1.] In a motion for a new trial, if the *rule nisi* states the charge differently from the charge itself, as written out by the Judge, and sent up with the record, this Court will be governed by the charge as written.

[2.] The assertion of title by the plaintiff in the absence of the defendant to the property in dispute, is inadmissible as evidence.

[3.] If the law is charged as requested by counsel, it is not error in the Court to omit charging something in addition to which its attention is not called by counsel.

An action of trover, tried before His Honor Judge GEO. D. RICE, in Union Superior Court, Spring Term, 1858.

[All the facts necessary to a full understanding of this case, are embodied in the opinion of the Court.]

MARTIN & CHISHOLM, for plaintiffs in error.

FRANCIS, *contra*.

By the Court.—Lumpkin J. delivering the opinion.

This is the ordinary case of a suit brought by the father-in-law, to recover from the son-in-law, property given to the daughter in her lifetime.

There are eight grounds taken in the motion for a new trial. These are reducible to four. I herewith transcribe the motion, with the decision of the Judge, as written out by himself upon it:

1st. Because the jury found their verdict contrary to the evidence in the cause.

2d. Because the jury found greatly contrary to the weight of evidence.

3d. Because the Court erred in charging the jury that if it was proven that Henry Alston the plaintiff had deliberately admitted, that he had given the property in dispute to Euphon W. Alston, that they were authorized to find for the defendant.

4th. Because the Court erred in charging the jury, that if Henry Alston the plaintiff had made any acknowledgments, that he had given the negroes in dispute to his daughter Euphon in her life time, that they might find for the defendant.

5th. Because the Court erred in charging the jury that if it was proven that Henry Alston the plaintiff, had acknowledged that he had given the property in dispute to Euphon in her lifetime, that then they had the right to infer, a delivery and everything else necessary to constitute a good and valid gift.

6th. Because the Court erred in charging the jury, that if, after the death of Euphon W. Alston, it was proven that Henry Alston, the plaintiff, admitted that he had given the negroes to Euphon in her lifetime, and that she being dead, the property fell to him, and he was her heir, that they had a right to infer all the requisites of a legal and valid gift were complied with.

7th. Because the Court erred in refusing to permit counsel for plaintiff to read in evidence to the jury, that part of the answer of Thomas M. Alston to the third direct interrogatory, which is in these words. (But I persuaded my father the plaintiff, to let the negro girl remain where I had hired her out, as we had plenty others at home. He plaintiff said he would not let her remain there, for then my sister Euphon would soon be claiming said girl,) it coming in after the words "have said negro girl sent back home."

8th. Because the Court erred when requested by plaintiff's counsel to give the jury in charge, the law relative to the weight that should be given to the conflicting testimony of witness, in charging the jury "that the testimony of that witness was entitled to the greatest weight who had the best opportunity of knowing the facts," and in not adding thereto, in the charge, the words "and the least inducement to speak falsely."

AT CHAMBERS, July 2, 1858.

The foregoing motion for a new trial in the case therein stated, having been by order of Court at the last Term of Union Superior Court, by and with the consent of the counsel for plaintiff and defendant, referred to me for my decision at chambers. I have examined and considered the motion and the several grounds therein stated; and as to the first and second grounds stated in the motion for a new trial, the motion for a new trial is refused because the verdict of the jury was well warranted by the evidence, and the Court is satisfied with the verdict.

And as to the third, fourth, fifth and sixth grounds, stated in the foregoing motion for a new trial, the motion is refused because the charge of the Court is not truly nor correctly stated and set forth in those grounds. What the Court did charge on the subjects referred to in those several last mentioned grounds, will appear from a copy of the charge of the

Court now hereunto annexed and referred to as showing the grounds of this refusal.

As to the seventh ground stated in the foregoing motion for a new trial, I see no error in the ruling of the Court as therein mentioned, and set forth, and therefore the motion on that ground is refused.

And as to the eighth and last ground stated in the motion for a new trial, the motion is also refused, because the Court gave the charge referred to in that ground, as requested by plaintiff's counsel, and if plaintiff's counsel wished the additional words mentioned in this last ground, to-wit: "and the least inducement to speak falsely," given in charge to the jury as part of the charge, he should have called the attention of the Court to it, and should have requested the additional charge. What the Court did charge as referred to in this last ground will appear from the copy charge hereto annexed. The Court therefore refuses the motion for a new trial.

GEO. D. RICE, *J. S. C.*

July 2d, 1858.

The following is so much of the charge of the Court to the jury on the trial of the above stated case, as is necessary to enable the Court to decide on the motion of Plaintiff for a new trial in said case:

"The defendant resists the recovery of the slaves in controversy by the plaintiff, on the ground of a parol gift, made, as defendant alleges, by the plaintiff to his daughter, Euphon W. Alston. To sustain this defense, the defendant must prove:

1st. That plaintiff gave the negro girl Sukey to Euphon W. Alston.

2d. That there was a delivery of possession of the negro girl to Euphon W. Alston. A parol gift of personal property without delivery of possession is not a valid gift. An actual manual delivery of the property is not necessary to constitute a valid gift, and therefore such a delivery need not be shown, but there must be some evidence that the donor had parted with the dominion of the property, and that dominion of the property vested in the donee. A parol gift of personal property may be established by the evidence of persons who were present when the gift was made, and are able to testify to the fact of the gift. It may, also, be established by proof of declarations and admissions of the donor as to the gift, but if these declarations and admissions do not extend to the delivery of the property, then evidence of some act of the donor or of some fact or circumstance, going to establish the fact that there was a delivery must be adduced in order to show that the parol gift was perfected by delivery.

The declarations and admissions of the plaintiff, that he had given the property to Euphon W. Alston, are good (if satisfactorily proved,) to establish the giving of the negro girl Sukey by plaintiff to his daughter Euphon W. Alston, and if such declarations and admissions were accompanied and connected with acts of the plaintiff, distinctly recognizing the rights of his daughter Euphon W. Alston, or acts done by his daughter Euphon, with the knowledge of her father, (the plaintiff,) such as exercising dominion and control of the negro girl, without objections from the plaintiff, (her father,) they were good to prove a delivery and other requisites of a good gift.

If it is proved in this case, that the plaintiff deliberately admitted that he had given the negro girl Sukey to his daughter Euphon W. Alston, and if it is also proved that the negro girl was in the possession of Euphon W. Alston, and that she with the knowledge of her father, and without objections from him, exercised dominion and control over the negro girl, hired her out and received the hire, then the jury ought to find for the defendant.

If it is proved that the negro girl Sukey was in the possession of, or under the control and dominion of Euphon W. Alston in her lifetime, and at the time of her death, and if it is also proved that the plaintiff, after the death of Euphon W. Alston, admitted and declared that he had given the girl Sukey to Euphon W. Alston, in her lifetime, but that she Euphon W. Alston was dead, and that he was her *heir*, and would get the property, *or*, that he was her heir, and the property fell to him, these declarations and admissions will authorize the jury to infer a delivery and other requisites of a good gift; for by claiming an interest in the property as heir of his daughter Euphon; the plaintiff admitted that the property had vested in Euphon, which it would not do unless there had been a gift perfected by delivery.

The Court at the request of the plaintiff's counsel, further charged the jury just as requested by plaintiff's counsel, that "in weighing the testimony of witnesses, the testimony of that witness who had the best opportunity of knowing the facts about which he testified, was entitled to the greatest weight. GEO. D. RICE, *J. S. C.*"

[1.] It will be perceived, that there are various specifications made against the charge of the Court in the application for a new trial. But the Judge in his opinion denies their correctness, and sets forth fully what he did charge; and we find no fault in it.

[2.] We think the Court was right in rejecting that part of the testimony of Thomas M. Alston, the son of the plaintiff, which relates to the conversation between his father and himself, with regard to hiring out the girl in dispute. The daughter was not present; and to let it in would be to allow the party to manufacture proof for himself.

[3.] The Court at the request of plaintiff's counsel, instructed the jury in the language of the request, as to conflicting evidence, "that the testimony of that witness was entitled to the greatest weight who had the best opportunity of knowing the facts." The complaint is, that he did not add thereto the words, "and the least inducement to speak falsely."

His Honor very properly held, that if counsel desired the addition, he should have asked it. It is not pretended that what the Court did say was wrong. The error assigned is, what the Court omitted to say. Counsel have duties to discharge as well as the Bench. Happy is that Judge who is not guilty of sins of *commission*.

As to the stereotype objection in all motions for a new trial, that the verdict was contrary to evidence, the weight of evidence, &c., all we have to say is, that there are two sides to this question. . The jury have found, that the proof is with the defendant. The Circuit Judge who presided in the cause, says, he is satisfied with the finding, and we are not prepared to hold, that he was guilty of a flagrant abuse of his discretion, in refusing to award a new trial.

Judgment affirmed.

ISHAM S. BROWN, et al. plaintiffs in error, vs. EDWIN B. SOCKWELL, defendant in error.

[1.] A memorandum not made by the party against whom it is offered in evidence, it not appearing by whom or upon what authority made, ought not to be admitted.

[2.] In a suit by heirs at law for the recovery of their portion of a share of an estate, paid into the hands of another for the heirs entitled, the claimants cannot be required to show that there were no creditors of the estate from which the share was received: The presumption of law is, that there are none, and the defendant, if he raises the objection, must prove it.

[3.] A step-father cannot make his step-children debtors to him for their support and maintenance. If he voluntarily supports them, they having no estate or a very small estate, he cannot, upon his voluntary act, raise a demand against them, he being neither administrator, executor or guardian, nor engaged to support them by executor, administrator or guardian.

In equity, in Carroll Superior Court. Tried before Judge **Hammond**, at April Term, 1858.

This bill was filed by Isham S. Brown, in right of his wife; Thomas S. Treadwell in right of his wife; and John T. McIntosh, complainants, against Edwin B. Sockwell.

The bill states, that sometime about 1847, James Head of Carroll county, departed this life intestate, possessed of a considerable estate, both real and personal, and leaving eleven heirs at law; being his children or the descendants of deceased children. That the mother of complainants was one, the present wife of Edwin B. Sockwell the defendant; that her first husband was Jesse D. McIntosh, and the wives of complainants Brown and Treadwell, and complainant John T. McIntosh are her children by her first husband; that she after McIntosh's death, but before the death of her father, married Sockwell, by whom she had four children living at the time of her father's death. The heirs, without administration, paid the debts of deceased, and by agreement divided the estate, and Edwin B. Sockwell received one full share in right of his wife and her children. At the time of this division, Brown and wife resided in the State of Mississippi, and Mrs. Treadwell and John T. McIntosh resided with their step-father, the defendant, being minors under the age of twenty-one.

That Sockwell never informed complainants that he had received their share of their grandfather's estate, but fraudulently concealed the fact from them, and that it was only a few months before the filing of this their bill, that they had discovered, that he had so received it. The bill claimed that complainants, each, were entitled to one-eighth of the share, or amount received by Sockwell, upon said division, and prayed that he account for and pay over the same, with interest thereon from the period of the division, which was in 1849.

The defendant's answer admitted that he married Mrs.

McIntosh, the mother of complainants, and daughter of James Head, as stated in the bill; and that at the death of said James, he had by his said wife four children living. He denied that he ever received any portion or share of the estate of deceased, in trust, for or on behalf of the complainants, or in any other way for them or on their account. Admits the division of James Head's estate by the heirs, as stated in the bill of complainants, but states that at said division, he received only a part of the share due and coming to his wife. The share of each was $829 19. He received only $485 20. The balance $343 99, although included in his receipt, was not in fact paid to, or received by him, but was received by his wife's first husband.

Defendant denied all fraud or fraudulent concealment.

Defendant further insisted, that complainants were indebted to him large sums for board, clothing and schooling, and which he set up as a set-off to their claim against him.

Upon the trial, complainants introduced in evidence the following receipt to-wit:

"Received of the legatees of James Heard, late of said county, eight hundred and twenty-nine dollars and nineteen cents in part of share of said estate. This 4th January, 1849.

(Signed,) E. B. SOCKWELL.

Complainants, further proved that defendant had received one hundred and twenty-five dollars, for a portion of a lot of land belonging to intestate, sold by defendant to one Oliver G. Barron. They further proved that upon the division of James Head's estate, defendant received the full one-eleventh share thereof, in right of his wife.

Defendant offered in evidence a copy of the above receipt, on which was the following memorandum. "*Copy of amount given at division*, $343 99." Complainants objected to the introduction in evidence of this copy receipt, and memorandum. Defendant then proved, that the copy receipt was in the hand-writing of Henry M. Head. That he, defendant, had asked Head for a copy of the receipt, and that he had given him the one now offered. The Court ruled out the copy receipt, but allowed the memorandum to go to the jury. To which ruling complainants excepted.

Defendant proved what was the worth of the board, clothing and schooling of complainants before they were large enough to work.

The Court charged the jury that the law presumed that the estate of James Head, deceased, was in debt, and that before complainants could maintain their suit, it must appear affirmatively, that the debts were all paid. To which charge, counsel for complainants excepted.

Counsel for defendant asked the Court to charge the jury, that if they believed from the evidence, that complainants lived with defendant, before he received their part of said estate, that then his set-off for board, &c. became a debt against them, and that he had a right to appropriate not only the interest but the principal of the amount they claimed in payment of said debt. Which charge the Court gave; and complainants excepted.

The jury found for the defendant. Whereupon complainants moved for a new trial upon the following grounds:

1st. The ruling and decision of the Court admitting in evidence the memorandum on the copy receipt.

2d. The charge of the Court, that the law presumed that the estate of deceased was in debt, and that before complainants could maintain their suit, it must affirmatively appear that there were no debts. And the further charge that defendant had the right to appropriate the principal and interest of the sum claimed by complainants to the payment of a debt for board, &c. due by them.

3d. That the jury found contrary to law and evidence.

The Court refused the motion for a new trial, and complainants excepted.

William J. Head, for plaintiffs in error.

Buchanan, *contra*.

By the Court.—McDonald, J. delivering the opinion.

Lucinda Sockwell, the wife of Edwin B. Sockwell, was the daughter of James Head. She was twice married. She first intermarried with Jesse D. McIntosh, by whom she had three children: John T. McIntosh, Margaret, the wife of Isham S. Brown, and Sarah Daniel, the wife of Thomas S. Treadwell. Jesse D. McIntosh having died, she married the defendant Edwin B. Sockwell, by whom also she had children. After the second marriage, and the birth of several children, James Head, the father of Mrs. Sockwell, died intestate. There was no administration on his estate. The heirs at law agreed to distribute the estate without an administration. At the distribution the defendant Edwin B. Sockwell received the whole share to which his wife and her children of both marriages were entitled under the Act of 1845. The complainants, children of the first marriage, bring this suit for the recovery of their part of the share received by the defendant.

The defendant in his answer denies that he received the shares of the complainants in the estate of the said James Head, on the contrary, he says, he did not receive the full share coming to his wife, that he gave a receipt for a larger sum than actually came to his hands. The defendant insists in his answer, that he is not accountable to the complainants, but that they must look to the administrator of their deceased father's estate, and he claims an allowance for board, clothing and other necessaries furnished the complainants during their minority.

[1.] The complainants, at the hearing of the cause, gave in evidence the defendant's receipt for the amount received by him at the division of the estate. The defendant offered in evidence a copy of the same receipt, together with a memorandum entered thereon as follows: "Copy of amount given at division $343 99." The counsel for the complainants demurred to this evidence. The Court rejected the copy receipt, but admitted the memorandum. The decision of the Court admitting the memorandum is excepted to. It does not appear that there is any memorandum to the original receipt or that there ever was such a memorandum attached to it; nor does it appear in whose hand writing it was made. There is certainly no reason why it should have been received as evidence to bind the complainants. It does not appear that it was not made by the defendant himself. The defendant is certainly not accountable for more than the complainant's portion of the amount which came to his hands, either in money, property, or his own debt to the estate of the intestate Head, but that memorandum is no proof, as the case is presented in the record before us, that the sum mentioned therein did not come to his hands.

On the finding of the jury for the defendant, a motion for a new trial was submitted by counsel for the complainants, which was refused by the Court, and the decision of the Court on that motion is excepted to. The admission of the memorandum in evidence which is made the first ground in the motion, has already been disposed of, and on that ground the motion ought to have been granted.

[2.] We think that the Court erred in its charge to the jury, that the law presumed that the estate was in debt, and that before complainants could maintain their suit, it must affirmatively appear that there were no debts. The estate was distributed without administration, and we hear of no objection on the part of creditors. But the defendant received the amount in his hands as the distributive share of one of the heirs at law of the intestate, viz: the share to which his wife would have been entitled if she had remained single, or had had no child after marriage. By law, that share was divisible among herself and children, born at the time of the death of the ancestor from whom it was inherited. For them, therefore, it was received and held in trust, and no creditor had any interest therein. It is true, that if there had been creditors, they would have had the right to pursue the assets, but it cannot be an objection to the defendant's responding to those for whose special benefit he held the property, that there may be creditors who have a right to pursue the effects. It was for him to show, not only that there were creditors, but that they had notified him of their claims.

[3.] The Court further charged the jury that the defendant had the right to appropriate the principal and interest of the sum claimed by complainants, to the payment of a debt for board, &c. due by them. The defendant had married the mother of complainants, who had little property. They were then small, and continued to live with their mother and step-father, who fed, clothed and gave them what schooling they got. It does not appear that they had a patrimony capable of supporting or educating them. It did not exceed the fourth-part of one hundred and forty dollars to each, and whatever it was, passed to the hands of the defendant. He was neither their guardian nor the administrator of their deceased father's estate. If he had been either, he could not have expended more than the income in their maintenance and education. This is the inference from the statute. If the income was not sufficient for that purpose, the Court ought to have bound them out. *Freeman and wife vs. Tucker*, 20 *Ga. Rep.* 9. There is very strong authority for saying that if a widow having children, marry again, and was of sufficient ability before the second marriage to support them, the husband shall be charged to maintain them, 1 *Black. Com.* 440. I believe, however, that the reason of the thing is against this, as well as the more recently adjudicated cases, 4 *Tenn. Rep.* 118. But the defendant, I apprehend, cannot be in a better situation than if he had been the guardian of complainants. A guardian cannot encroach upon the capital of his ward for his maintenance and education, nor can he or any one else make him his debtor against his will. He certainly would not without request, involve him in debt so as to consume any estate which he might subsequently acquire. The maxim, that once a gratuity, always a gratuity, applies with all its force to such a case. If the complainants, on attaining majority had promised to pay the expenses of the defendant, their step-father, in their maintenance and education, without fraud, imposition, or improper influence, that he did incur expenses for these objects, would be a sufficient consideration to support an action. *Cooper vs. Martin*, 4 *East.* 82. There is no evidence of a promise in this case. By a late statute in England, passed in the reign of William 4th, every husband is made liable to maintain the children of his wife, born before his marriage with her, whoever was their father, and whether the children are legitimate or illegitimate, until the children attain the age of sixteen years, or until their mother's death. We have no such statute here, and I think that by the construction of our statutes, whenever an infant is entitled to an estate, the income of which is sufficient for his maintenance and education, he is responsible for such expenses, when contracted in a regular way by executor, administrator or guardian; that if the income of his estate is incompetent to his support during his minority, he should be bound out, and that for expenses gratuitously incurred by others, for him, he is not legally liable.

The judgment of the Court below ought, we think, to be reversed and a new trial granted, on the two first grounds taken in the motion.

Judgment reversed.

MAHALA SHERILL et al. plaintiffs in error, vs. JOSIAH R. PARROTT, defendant in error.

The Superior Court has no jurisdiction to enforce the execution of an order issued by a Justice of the Peace before whom a possessory warrant for the restoration of personal property was sued out.

Possessory warrant, in Polk Superior Court. Decision by Judge HAMMOND at April Term, 1858.

The facts in this case are sufficiently stated in the following order, passed by the presiding Judge, and to which counsel for defendants excepted, viz:

GEORGIA, } Superior Court, April Term, 1858.
Polk county. }

Upon argument by counsel on both sides.

It appearing to the Court that on the — day of August, 1857, Josiah R. Parrott, administrator of the estate of Jesse Dickerson, deceased, late of Cass county, sued out before Israel P. Davis, a Justice of the Peace in and for the county of Polk, a warrant for the possession of seven negroes, slaves, in said warrant named, to-wit; (here the slaves are described &c.) against Benjamin F. Smith and Mahala Sherill, of said county, under the provisions of an Act entitled an Act more effectually to quiet and protect the possession of personal property, passed in 1821. That upon the return of said warrant, said defendants, refusing to produce said negro slaves to be dealt with according to law, were ordered to be committed to the common jail of Polk county by said Justice. That said defendants were delivered, together with said warrant and mittimus, by William Jones, a Constable in and for ——— District G. M., Polk county. That at the October Term of the Superior Court of Polk county, said Parrott applied for a writ of mandamus to be directed to Josiah C. York, Sheriff of said county, requiring him to show cause why he should not be attached for contempt of Court in not obeying the order of said Justice, and not committing said defendants to jail as directed in and by said order; that said Sheriff, for cause, showed that there was no sufficient jail in the county of Polk. Whereupon the Superior Court ordered him to deliver the defendants to the Sheriff of the county of Cass or his lawful deputy, to be imprisoned in the common jail of said county of Cass, without bail or mainprise; until they should produce said negroes. That said Sheriff failed to obey this order, and on the 10th February, 1858, the Hon. D. F. Hammond, Judge of the Superior Court, granted an order, directed to said York, Sheriff as aforesaid, to re-arrest the defendants and deliver them to the Sheriff of Cass county, to be imprisoned in the jail of said county of Cass until said negroes should be produced. Whereupon the said Sheriff re-arrested the defendants, and instead of delivering them to the Sheriff of Cass county, delivered them to the Jailor thereof, and said defendants applying to the Inferior Court of Cass county for a habeas corpus, were discharged by said Court from imprisonment, without said Parrott, who resided in Cass county, or his attorney, having any notice of said application, whereby the order of the Superior Court was set aside by the Inferior Court, contrary to law.

It is, therefore, ordered that the Sheriff of the county of Polk re-arrest said Benjamin F. Smith and Mahala Sherill, and them immediately imprison in the common jail of the county of Polk without bail or mainprise, until they shall produce said negro slaves, in said possessory warrant named, before the said Israel P. Davis, Justice of the Peace aforesaid, to be dealt with according to law.

D. F. HAMMOND, J. S. C. T. C.

After the above order was passed, and on the same day, defendants moved to set aside the same, which the Court refused, and defendant's counsel excepted.

Wofford; Shropshire; and Underwood & Smith, for plaintiffs in error.

Chisolm & Waddell; and Irwin & Lester, *contra*.

By the Court.—McDONALD J. delivering the opinion.

The possessory warrant for the restitution of the property to the claimant was sued out before a Justice of the Peace, who, upon the defendants' refusing to produce the property, committed them to the jail of Polk county. The Justice of the Peace who issued the warrant, had jurisdiction of the cause and competent power to enforce the execution of his orders. The Judge of the Superior Court had no jurisdiction of it, and no authority to issue a writ of mandamus, directed to him who was the ministerial officer of another functionary, to execute an order not emanating from him.

The whole proceeding, so far as it relates to the action of the Superior Court, is void, and the party moving the warrant, must depend on the jurisdiction before which he has elected to proceed, for the attainment of his rights.

Judgment reversed.

ANDREW J. WELLS, plaintiff in error, vs. **DREWSON A. WALKER**, defendant in error.

A judgment of this Court was, simply; "that the judgment of the Court below, be reversed;" the case in which, it was rendered, was one in which, there was a decision excluding offered evidence, and was an order dismissing the case.

Held, That the word, judgment, used in the judgment of this Court, referred to the order, rather than, to the decision.

Ejectment, in Gordon Superior Court. Decision by Judge TRIPPE, April, 1858.

The facts of this case are fully stated in the opinion of the Court.

WM. T. WOFFORD; and WARREN AKIN, for plaintiff in error.

WALKER, *contra.*

By the Court.—BENNING J. delivering the opinion.

Walker, as guardian, brought ejectment against Wells, in Gordon Superior Court. At September Term, 1857, the case was tried; and, for alleged error of the Court, committed on the trial, the case was brought to this Court, at March Term, 1858. The bill of exceptions thus states the alleged error; "To the introduction of this testimony, the defendant objected, on the ground, that the testimony attacked the grant, which he insisted could not be done. Plaintiff insisted, that he had a right to show by said testimony, the person to whom the land was granted under the description, 'Berry Stephens, orphan.' After argument, the Court sustained the objection of defendant's counsel, and excluded said testimony, and plaintiff excepted, and suffered a non-suit."

The Court, having thus excluded this testimony, made this order; "Upon motion of defendant's counsel, it is ordered by the Court, that the above cause be dismissed."

This was the case brought before this Court at March Term, 1858, and the judgment rendered in the case, by this Court, was as follows; "That the judgment of the Court below be reversed; it being the opinion of this Court, that the interrogatories were admissible."

At the next term of the Superior Court, a motion was made by Walker to have this judgment of this Court entered on the minutes of that Court, and to have the case re-instated in that Court. That motion was objected to, on the alleged ground, that at September Term, the Court had passed the order aforesaid, dismissing the case, and the order had not been excepted to, and had not been passed on, by this Court; that the only error complained of, was, that of excluding the evidence; and, that the judgment of this Court, did not order a new trial, or, order the case re-instated. The Court overruled the objection, and granted the motion. And that was excepted to. And this is the exception, for the consideration of this Court at this term.

The judgment of this Court, was, that "the judgment of the Court below be reversed." What did this Court mean, by the word, judgment,—the decision excluding the evidence, or, the judgment of non-suit; that is, the judgment aforesaid, dismissing the case?

A decision excluding, or admitting, evidence, is a matter not of record; it exists only in parol; it is a matter, therefore, to which the term, judgment, is not appropriate. Accordingly, it is not usual to apply the term, to decisions excluding, or admitting evidence. Whereas, the term, judgment, is the very one appropriated to the act of the Court, which makes *an end* of the case. This order dismissing the case, made an end of the case.

According, then, to the general rule, we should have to say, that this Court meant by the word, judgment, the order dismissing the case, rather than the decision excluding the testimony.

Are we not at liberty, to go by the general rule? No, it is said, and for two reasons; 1st, because the non-suit was according to the wish of the party non-suited,—that is, was suffered voluntarily by him; and 2dly, because the non-suit was, in fact, not excepted to and carried up.

But, it is not true, that the non-suit was voluntarily suffered by Walker, the party non-suited. What is true is, that that the case was dismissed, on the motion of the *defendant* in it, Wells.

And even if it be true, that the decision excluding the evidence, was all that was excepted to and carried up, yet if that decision was wrong, the fact that it was wrong, gave this Court jurisdiction, to "award such order and direction, in the premises, as" were "consistent with the law and justice of the case." (*Cobb* 450.)

Awarding a reversal of the judgment dismissing the case, was doing, what was consistent with the law and justice of the case.

There is nothing, then, in these two objections, to prevent the word, judgment, as used in the judgment of this Court, from having its ordinary meaning; and so, nothing, to prevent it from applying, rather to the order dismissing the case, than to the decision excluding the testimony.

We think, therefore, that the Court was right in overruling the objection to the motion.

Judgment affirmed.

N. F. CAMP, plaintiff in error, vs. BANCROFT, BETTS & MARSHALL, defendants in error.

A bill in Chancery will not be amended to enable the complainant to introduce matter which could not possibly have constituted a part of it at the time it was filed, in order to vitiate proceedings subsequently had, which were legal and regular at the time.

Illegality, in Butts Superior Court. Decision by Judge CABANISS, at June adjourned Term, 1857.

Bancroft, Betts & Marshall foreclosed a mortgage which they held against Nathan F. Camp, and issued a *fi. fa.* 6th December, 1856, under which the Sheriff levied upon one of the negroes mentioned in said mortgage.

Camp filed his affidavit of illegality, stating that said *fi. fa.* was proceeding against him illegally, because said mortgage had been restrained by an injunction issued out of Chancery upon a bill filed by affiant, and said mortgage had been foreclosed and *fi. fa.* issued since the suing out and service of said bill and injunction, and which are yet pending in Butts Superior Court.

Upon the hearing of the case, the counsel for Bancroft & Co. moved to dismiss the affidavit of illegality.

Counsel for Camp objected to said motion, and moved to amend his original bill in equity, upon which and the proceedings therein had, he had predicated his grounds of illegality. The Court refused the motion to amend, dismissed the affidavit of illegality, and ordered the mortgage *fi. fa.* to proceed. To which order counsel for Camp excepted.

D. J. Bailey, for plaintiff in error.

J. J. Floyd, *contra.*

By the Court.—McDonald J. delivering the opinion.

The only ground of illegality alleged in the affidavit is, that the mortgage on which the writ of *scire facias* was issued, has been enjoined and the mortgagees restrained from enforcing it, and that since the service of the injunction, the mortgage has been foreclosed, and on the judgment of foreclosure the execution was issued. On looking into the record it appeared there was no such injunction. The complainant moved to amend his bill in the Court below so as to allege facts transpiring since the filing of the bill, and which could not possibly have constituted a part of it truthfully, at the time of filing it. The Court refused the amendment for the purpose for which it was moved—to enable the party to introduce matter which could not possibly have been a part of it at the time it was filed, in order to vitiate proceedings subsequently had, which were legal and regular at the time.

But if the injunction had restrained the party and he had proceeded in defiance of it, it is somewhat questionable if the complainant's remedy was not by a proceeding for contempt. An injunction operates *in personam*, and not against the Court.

Judgment affirmed.

Lewis Tumlin, plaintiff in error, vs. **David Quarles**, defendant in error.

Quarles sued Tumlin, and D. House, and F. H. House, on a note made by Tumlin, and payable to D. House, and by him endorsed to F. H. House, and, by him, to Quarles—the note not containing words of negotiability.

Held, That Quarles might amend his declaration, by striking out the two Houses, as defendants, and making D. House a plaintiff suing for his, Quarles' use.

Complaint, in Cass Superior Court. Tried before Judge **Trippe**, at March Term, 1858.

The facts of this case are sufficiently stated in the opinion of the Court.

Milner & Parrott, for plaintiff in error.

Wofford & Crawford, *contra.*

By the Court.—**Benning** J. delivering the opinion.

David Quarles sued Lewis Tumlin, Davis House, and Felix W. House, on a note, and the endorsements thereon, of which note and endorsements, the following are copies:

"$200. Two months after date, I promise to pay Davis House, two hundred dollars, for value received. This 5th August, 1856.

LEWIS TUMLIN."

"I assign over the within note to F. W. House, for value received. This 8th day of September, 1856.

DAVIS HOUSE."

"I assign the within note over, to David Quarles, for value received. This 9th day of September, 1856.

FELIX W. HOUSE."

On the trial, the reading of the note and endorsements was objected to, on the ground, that an action against the maker of the note, could be maintained, only, in the name of the payee; and the objection was sustained by the Court.

Thereupon, the counsel for Quarles, the plaintiff, moved to amend the declaration, by striking out the names of the endorsers of the note, and inserting the name of the first endorser, Davis House, the payee of the note, as plaintiff suing for the use of him, Quarles. Which motion was objected to, by the counsel for Tumlin, but was sustained by the Court. And to that decision, Tumlin excepted.

We think, that the Court was right in allowing the amendment. The amendment produced no change in the cause of action, or, in the rights of the parties. Before the amendment, Quarles was the only party plaintiff; after the amendment, he was still the *substantial* party plaintiff—the action being, even then, for his use. And the cause of action itself, was still the note.

The two Houses could, in no event, be liable to Tumlin. So, striking them out, as defendants, could not prejudice any right of his.

And the Act of 1854, allows parties, to "amend their pleadings in all respects, whether in matters of form or matters of substance." *Acts*, 48.

Judgment affirmed.

JAMES M. CARTER, plaintiff in error, vs. SINGLETON G. HOWELL, defendant in error.

A party is not entitled to an appeal from the verdict of a jury, under the Act of 1827, which gives landlords a summary remedy for the recovery of the possession of land held over by a tenant, after the expiration of his lease, or the time for which the land was rented to him.

Proceedings to remove tenant, whose lease had expired, in Fulton Superior Court. Decision by Judge BULL, at April Term, 1858.

This was a summary proceeding by Howell, the landlord, to remove Carter, the tenant, from premises rented by him, after the expiration of his lease, under the Act of 24th December, 1827.

The tenant having made oath as prescribed by the 2d section of said Act, the proceedings were returned to the Superior Court of Fulton county, to try the fact at issue between the parties. The case was submitted to a petit jury, who found for the landlord, (Howell,) that the lease had expired. Carter immediately entered an appeal from the verdict, giving bond and security, as required by law in cases of appeal, Afterwards, at a subsequent day in the same Term, counsel for Howell moved to dismiss the appeal, and for a writ of possession to issue, requiring the Sheriff to put him in possession of the premises. This motion was made upon the ground that an appeal did not lie in such cases, from the verdict of the petit jury.

The Court sustained the motion, and dismissed the appeal, and ordered the writ of possession to issue, and counsel for Carter excepted.

GLENN & COOPER, for plaintiff in error.

OVERBY & BLECKLY, *contra*.

By the Court.—McDONALD J. delivering the opinion.

This was a proceeding by a landlord, under the Act of 1827, (*Cobb's New Dig.* 901,) to recover from his tenant, land which had been rented to him, and which he refused to surrender after the expiration of the lease, or time for which it had been rented. No record is sent up, and we must determine the cause by the bill of exceptions. It is to be presumed that all proceedings under the act preliminary to the formation of an issue to try the question whether the lease had expired, or whether the tenant held under the plaintiff, were had and were regular. The jury found the issue in favor of the plaintiff, and from this finding the tenant appealed, and the Court below dismissed the appeal at the same Term of the Court, and ordered a writ of possession to be issued, on the ground that no appeal lay in the case.

The statute gives no right of appeal, and the appeal was, therefore, void, and could not carry the cause over to the next Term of the Court.

The appeal being void, it follows that it did not stand in the way of the judgment of the Court ordering the writ of possession to issue.

Judgment affirmed.

BARKSDALE, and others, plaintiffs in error, vs. BUNKLEY, HARVEY, and others, defendants in error.

The parties to a controversy, agreed to submit it to the decision of the Judge, and to let him fix the fees of their counsel, with the right to the counsel, to except to his decision, and bring it before the Supreme Court. The counsel submitted their claims for fees, to the Judge, and he fixed the amount of their fees. To his decision, a portion of the parties to the submission filed a writ of error, but failed to make the counsel parties to the writ.

Held, That the counsel were necessary parties to the writ; and for want of them, the writ was dismissed on motion.

The facts are stated in the opinion of the Court.

Dougherty, for plaintiffs in error.

Peeples; and Hill, *contra.*

By the Court.—Benning, J. delivering the opinion.

Mrs. Marharine Bunkley, late of Upson county, made two wills before her death, one in 1848, and one in 1850. These two wills gave rise to a great deal of litigation involving a great number of parties. One of the cases growing out of the litigation, was still pending in 1857; viz, a case in favor of Caroline M. Bunkley, by her guardian, Isaac M. Brown, against Terrell Barksdale, Stephen Harvey, Samuel Barksdale, Edward G. Harvey, Eusebius A. Hopkins, and his wife, Anna, and others.

In 1857, the parties in this case, and a number of other persons interested in Mrs. Marharine Bunkley's estate, entered into an agreement for the settlement of the litigation.

One of the stipulations in this agreement was, that the "fees" of the counsel engaged in the litigation, were to be "settled" by the Judge of the Superior Court of Upson county, "to whom," in the words of the agreement, "the parties hereto, do jointly and severally, agree to refer the whole question, as to counsel fees, and the amount to be paid to Terrell Barksdale, as above stated, in the whole litigation under said wills, and which have not heretofore been paid, or are not herein above expressly provided for; said Court to hear and determine, on the whole question of law and fact, to adjudge and determine, what fees are chargeable upon, and to be paid out of, said estate, and also, by the several parties, and the amount to be paid to each of the counsel, and to said Barksdale, and by whom paid, reserving to each of the parties hereto, and allowing to any of the counsel who may thus submit the question of fees, the right to except to said decision, and carry the same to the Supreme Court, in terms of the law."

The counsel submitted the question of fees, to the Judge; and he made an award by which, he fixed the amounts of their fees, and designated the fund, or interest, in the estate, out of which, the fees were to be paid.

To this award, Terrell Barksdale, Stephen Harvey, and others, excepted; and, on a bill of exceptions, they brought it up to this Court. They, however, failed to make the counsel to whom the fees had been awarded, parties to the bill of exceptions and writ of errors; and for this omission, a motion was made, to dismiss the case from this Court.

The question, therefore, is, whether the counsel were necessary parties to the case. And, we think, that they were, beyond a doubt.

The agreement stipulates, by the strongest implication, that the counsel may submit the question of their fees, to the Judge; it stipulates, expressly, that they may except to the award. They did submit this question, to him, and he decided it. They thus became, themselves, parties to the agreement, and to the award. If so, it follows as a matter of course, that they acquired the right, to be parties to any proceeding having for its object, the annulling or changing of the award, in the respects in which, it affected them.

The present proceeding, that is, the writ of error in the case, had this for its object. Mr. Dougherty, the counsel for the plaintiffs in error, expressly, refusing to allow the revision of this Court, to be confined to those parts of the case, in which, the counsel had no interest.

The counsel, then, had the right to be parties to this writ of error. Not having been made such, the writ of error is subject to be dismissed for want of parties.

We think, that the motion to dismiss the writ, ought to be sustained.

Writ of error dismissed.

CHARLES CLEMENTS, plaintiff in error, vs. JEPTHA LANDRUM, ex'or., defendant in error.

The consideration expressed in a deed, although paid in property, is to be presumed to be the value in money of the property, though it is subject to rebuttal by evidence.

Covenant, in Fayette Superior Court. Tried before Judge BULL, at March Term, 1858.

This was an action to recover damages for the breach of a covenant contained in a deed executed by Clements to Landrum's testator, conveying lot of land No. 147, in the 7th District of Fayette county. The deed contained the usual covenant of a warranty of the right and title to the vendee his heirs and assigns, against the claims of the vendor, his heirs, executors, and administrators, and against the claim of all other persons whatever. The breach alleged was, that the vendee had been evicted by title paramount.

After the evidence was closed, and argument by counsel, the presiding Judge charged the jury that in this case, it was competent for either party to prove a different consideration from that expressed in the deed, but in the absence of proof of a different consideration, the law presumed the one mentioned in the deed to be the true one, and the defendant must show affirmatively that a different consideration was the true one; otherwise the one mentioned in the deed would be regarded as the true one, it being *prima facie* evidence of what the consideration was. That in this case the consideration to Clements was the one necessary to be proved; but if said consideration was not proven to the reasonable satisfaction of the jury, that then, and in that case, they should look to the consideration expressed in the deed.

Defendant's counsel asked the Court to charge the jury, "that although the amount expressed in the deed was *prima facie* evidence of what the consideration was, yet if the plaintiff proved a different consideration, but failed to prove the value of that consideration, that then he could not recover on the one expressed in the deed." The Court declined to give this charge, but, as before, charged the jury that unless a different consideration had been proven, the one mentioned in the deed should be relied on.

To which charge and refusal to charge, defendant excepted.

The deed was dated 14th March, 1846. The consideration or purchase money mentioned in the deed was $300.

The jury found for the plaintiff $573 68¾ and cost of suit.

Whereupon defendant's counsel tendered their bill of exceptions, assigning as error the charges and refusal to charge above excepted to.

Huie & Connor; and M. M. Tidwell, for plaintiff in error.

A. W. Stone, *contra.*

By the Court.—McDonald, J. delivering the opinion.

The consideration expressed in the deed on which the action is brought, is three hundred dollars. The evidence shows that a money consideration was not paid, but that the land conveyed was given in part consideration of another tract of land. It was not in proof, at what value this land was estimated in the trade. The consideration expressed in the deed must, therefore, be presumed to be the value of the land in money agreed upon by the parties. As the presiding Judge in the Court below said to the jury, it is a presumption which might be rebutted by evidence; but unless so rebutted, it must stand as the price agreed upon by the parties.

Judgment affirmed..

Clark, Austin & Smith, plaintiffs in error, vs. **Wm. Kay**, defendant in error.

Any liquidation of the damages to be paid, for the mere non-payment of money must, of necessity, be in violation of the law fixing the interest to be paid, for the use, or the detention, of money; that liquidation excepted, by which the sum to be paid would be not greater, than the sum which would be to be paid by this law.

Debt, in Fulton Superior Court. Tried before Judge **Bull**, April Term, 1858.

The facts of this case are stated in the opinion delivered by the Court.

Thomas L. Cooper, for plaintiffs in error.

A. W. Hammond & Son, *contra*.

By the Court.—BENNING J. delivering the opinion.

The plaintiffs in error, sued the defendant in error, upon a bond of which the following is a copy:

"GEORGIA, Fulton county.

I, William Kay of the county and State aforesaid, for and in consideration of my liability unto Messrs. Clark, Austin & Smith, of the city of New York, upon the five original notes of which, the above and foregoing are true copies," (the copies being, one, for $500, payable at seven months after date; one, for $550 50, payable at four months after date; one, for $420 50, payable eight months after date; one, for $550 50, payable at five months after date; one, for $508 75, payable at three months after date;) "as well as, in consideration of the withdrawal of their suit now pending against me, in the Superior Court of said county, upon the two first mentioned notes above, and in consideration of their forbearance to sue the three last mentioned notes above, and also, in consideration of the sum of ten dollars to me in hand paid, by the said Clark, Austin & Smith, the receipt whereof is hereby acknowledged,—do, by these presents, agree with, and promise unto, the said Clark, Austin & Smith, to pay the original of the said foregoing notes, in the following manner; to-wit, I promise to pay unto them, or their agent in Atlanta, the sum of two hundred and fifty dollars, on each and every month, beginning with the present month of April eighteen hundred and fifty-five, and continuing so to pay the sum of two hundred and fifty dollars, monthly, until all of said notes are paid off and discharged in full; said payments to be made on said notes in the order of their several maturities; that is to say, the first notes due, to be first paid, and said payments to be made at some time during each and every month, and, on, or before, the last day of every month; and I do hereby promise unto the said Clark, Austin & Smith, that, in case, I should not make the monthly payments on said notes of two hundred and fifty dollars, promptly and punctually, on or before the last day of each month, according to the true intent and meaning of these presents, then, and in that case, I hereby promise to pay unto the said Clark, Austin & Smith, the sum of two hundred and fifty dollars, for every failure to make the above mentioned payments, monthly; which sum of two hundred and fifty dollars, upon my default, as aforesaid, I promise to pay unto them, not, as a penalty, but as liquidated damages, assessed, and hereby, agreed upon, in addition to the amount that may at any time, be due upon said notes; said sum of two hundred and fifty dollars hereby agreed upon as liquidated damages, for any and every of my defaults, in making said payments, as aforesaid, to be recovered in any Court of Law, or Equity, having proper jurisdiction thereof. All of which, for the various considerations above mentioned, I hereby promise to the said Clark, Austin & Smith, this eleventh day of April, eighteen hundred and fifty-five. In testimony whereof, I have hereunto affixed my hand and seal."

[Signed] "WILLIAM KAY."

The declaration alledged, that Kay had failed to make the monthly payments of $250, in, and for, October, November, and December, 1855, and January, 1856.

The Court charged the jury, that the plaintiffs could not recover in their action, because the sum aforesaid of $250, to be paid for every default in a monthly payment, was not in the nature of liquidated damages, but was a penalty, which the plaintiffs could not recover, upon a breach of the conditions of the bond; and, the action being for the recovery of said penalty, the Court instructed the jury, to find for the defendant. To this charge and instruction, the plaintiffs excepted.

Was this course of the Court, right?

"It is well settled, that no damages for the mere non-payment of money, can ever be so liquidated between the parties, as to evade the provisions of law which fix the rate of interest." This is the remark of Sedgewick, in his work on the measure of damages (*p.* 400,) and we think the remark, true. See *Orr vs. Churchill*, 1 *H. Black.*, 233, and the other cases cited by him, (400 *et seq.*) Of course the remark is to be taken with the qualification, if the damages stipulated for *exceed* the sum which the law fixing the rate of interest, would give.

Of the many cases cited by Mr. Cooper, for the plaintiffs in error, not one, was a case opposed to the proposition contained in the remark.

In the present case, the sums which the bond calls, "liquidated damages," were to be the damages for failure to pay mere money; and they greatly exceed the sums which, the interest law would require to be paid for such failures. The stipulation to pay them comes, therefore, in conflict with the provision of that law. (See *Cobb Dig.*, 393.)

It follows, that these sums cannot be recovered as liquidated damages. See 17 *Ga. R.*, 609.

We think, then, that the Court was right.

Judgment affirmed.

JOSIAH R. BOSWORTH, plaintiff in error, vs. JOHN W. DAVIS, defendant in mortgage fi. fa., and NEVITT, LATHROP & STEBBINS, claimants, and defendants in error.

The Clerk of the Superior Court alone of the county in which a deed is attested, and in which it must be recorded, can by his official attestation, with one or more other witnesses, give it such authenticity as to admit it to record.

Claim, from Fulton Superior Court. Tried before Judge BULL, at April Term, 1858.

Davis the defendant in *fi. fa.*, executed to Bosworth, a mortgage on a certain lot in the city of Atlanta, to secure the payment of a certain promissory note. The mortgage bears date, the 15th November, 1853, and was signed, sealed and delivered by said Davis, "in the presence of A. E. Johnson, S. J. Shackleford, *William J. Russell, Clerk Superior Court, of Fayette county.*" The lot of land was situated in that part of DeKalb county, afterwards cut off into the county of Fulton. The mortgage, without proof by any of the subscribing witnesses, or any further probate or acknowledgement, was recorded in the Clerk's office of DeKalb county, 9th February, 1854.

This mortgage was foreclosed and *fi. fa.* issued, 28th April, 1855, and levied upon the mortgaged property, when Nevitt, Lathrop & Stebbins, interposed their claim to the same. Issue was joined and the case transferred to the appeal by consent.

Upon the trial, plaintiff in *fi. fa.* offered in evidence the mortgage deed. Counsel for claimants objected to its introduction, upon the ground that it "was not proven or attested in such manner as to authorize the recording of the same," it having been attested by the Clerk of the Superior Court of Fayette county, and recorded in the county of DeKalb, in which county the property was situated at the time. The Court sustained the objection and repelled the deed, and counsel for plaintiff excepted.

Ezzard & Collier, for plaintiff in error.

A. W. Hammond & Son, *contra.*

By the Court.—McDonald, J. delivering the opinion.

This record presents but a single question, viz: Is the attestation of a mortgage of land by a Clerk of the Superior Court of a county other than the county in which the land lies, and in which it must be recorded sufficient to admit it to record without other proof. The object of the acts giving authority to the Clerks of the several Superior Courts of this

State to attest or take the probate of deeds, bills of sale or other conveyances of real or personal property, so as to admit them to record, was no doubt, the accommodation of persons wishing to execute or prove deeds, for the purpose of putting them on record. It was not always convenient to find a magistrate or other judicial officer, before whom the deed could be proven, or the conveyance attested, and the clerk in whose office the law required it to be recorded was always at hand, and we have no doubt that such probate or attestation can be made before the clerk alone, whose duty it is, to record the deed, if there had been no other act than that of January, 1850. *Cobb* 181. But the Act of the 14th February afterwards, is pretty plain on this subject. It declares that the clerks of the Superior Courts shall administer to any witness or witnesses to a deed, conveyance, or other paper *entrusted* for record, &c. *Cobb* 180. By the Act of 1854, a deed may be attested, so as to be admitted to record, by two witnesses, one of whom shall be the Ordinary, Clerk of the Inferior Court, Sheriff, deputy Sheriff, &c. &c., of the county in which the instrument is executed or acknowledged.

We think that the Clerk of the Superior Court alone, of the county in which a deed is attested, and in which it must be recorded, can, by his official attestation with one or more other witnesses, give it such authority as to admit it to record.

Judgment affirmed.

JOHN RODAHAN, plaintiff in error, vs. JOSIAH GOGGINS, administrator of William Dryden, defendant in error.

An acknowledgment of service on a summons in a Justice's Court, was in these words: "We acknowledge due and legal service on the within summons."

Held, That the import of the acknowledgment was, that there had been done, whatever was necessary, to make the service due and legal.

The case is stated in the opinion of the Court.

Burk & Black, for plaintiff in error.

Merrell, *contra*.

By the Court.—**Benning**, J. delivering the opinion.

Josiah Goggins, as the administrator of William Dryden, brought divers suits in a Justice's Court, against John Rodahan, and two others. On the back of each summons, was this acknowledgment: "We acknowledge due and legal service on the within summons. This 29th Sept. 1857."

(Signed,) "JOHN RODAHAN,
A. J. BERTRAM,
J. M. HANLY."

Rodahan, after having carried the cases to the appeal, moved to dismiss them all, except one, on which a verdict on the appeal had been taken, the ground of his motion being, that "the defendants had never been served with a copy of the summonses, and had not waived a copy." The Justice's Court overruled this motion, and the case was taken, by certiorari to the Superior Court, and that Court dismissed the certiorari, and affirmed the judgment of the Justice's Court.

Was this decision of that Court right? We think so.

The acknowledgment is, of "due and legal service on the" "summons." This imports, that whatever was necessary to make due and legal service of the summons, had been done; it imports, therefore, that a copy had been delivered to the defendants, if the delivery of a copy to them, was a thing necessary to due and legal service.

Judgment affirmed.

JOHN B. GORDON, et al., plaintiffs in error, vs. JOHN W. ROBERTSON, defendant in error.

An appeal bond signed by one of several defendants, against whom the verdict appealed from was rendered, the other defendants and no one else signing as his security, is not even an attempt to comply with the statute, and is neither good as an appeal bond, nor can it be amended.

Debt, from Troup Superior Court. Decision by Judge BULL, at May Term, 1858.

John W. Robertson brought suit, in the Inferior Court of Troup county, against John B. Gordon, as principal, and Thomas J. Bacon and Alexander A. Roberts, as sureties, upon a note given for the hire of negroes.

There was a verdict for plaintiff, and an appeal. Upon the case being called for trial on the appeal, in the Superior Court, the plaintiff moved to dismiss the appeal, upon the ground that there was no security on or to the appeal bond. The bond was signed by John B. Gordon, by attorney, B. H. Bigham, Thomas J. Bacon and Alexander A. Roberts, the parties defendant, and by them only. Pending the motion to dismiss, counsel for Gordon moved to give the security required by law, at the same time stating that it was the intention, at the time he executed the bond, as attorney for Gordon, to take a legal and complete appeal; that he signed the bond in blank, and left it to be filled up by the Clerk, and the procuring the securities to be attended to by Mr. Roberts, he himself being suddenly called away from Court, by the sickness of a relation.

The presiding Judge here adds: "no effort having been made to provide security, and it not appearing that any one was willing, or had intended, to sign as security."

Counsel for defendants further insisted, that even if it was not a good appeal for all the defendants, yet, as the record stood, it was good as an appeal for John B. Gordon, the principal in the action, and as to him should not be dismissed.

The presiding Judge refused to allow the appeal bond to be amended, by giving the security proposed, and dismissed the appeal, and counsel for defendants excepted.

B. H. BIGHAM, for plaintiffs in error.

MILTON H. RACHELS, *contra.*

By the Court.—McDONALD J. delivering the opinion.

The only persons who signed the appeal bond as sureties, are parties defendant in the cause, against whom the plaintiff had recovered a verdict. There was no attempt or offer to give any security, for the bond of these parties gave no additional guaranty to the plaintiff, or strength to the demand on which he had recovered the verdict. It was, therefore, neither a compliance, nor an attempt to comply, with the requisitions of the statute, to give the plaintiff security for the eventual condemnation money.

It follows that the appeal was not good, as to the defendant, Gordon. There is no precedent for the motion made in this case. There is nothing like it in any of the adjudicated cases, and they have gone quite far enough.

Judgment affirmed.

BEVERLY MAYNARD, plaintiff in error, vs. JAMES LAWRENCE and MALACHI LAWRENCE, defendants in error.

A motion for a new trial, ought to be overruled, when the grounds of it, are not true, in point of fact.

Trover, and motion for new trial. Tried before Judge CABANISS, November, 1857.

The facts are sufficiently stated in the opinion of the Court.

MARTIN, ALFORD & STEWART, for plaintiff in error.

GIBSON, *contra.*

By the Court.—BENNING, J. delivering the opinion.

The defendants in error, sued the plaintiff in error, in trover, for a negro, and got a verdict. There was a motion for a new trial, which motion was put on the grounds, that the verdict was contrary to the evidence, and to the law; and, that one of the jurors, was related to James Lawrence, one of the parties, in whose favor the verdict was. This motion the Court overruled. In doing so, was the Court right?

We think, that there was a plenty of evidence, to support the verdict. It would be useless, to state the evidence merely that the reasons for this opinion, might appear. The question is only one of fact.

As to the other ground—it is equally true, that it cannot be said, that that ground is true in point of fact. The juror swears that, James Lawrence's wife, may have been the daughter of the juror's wife's uncle, but he, (to use his own words,) "now doubts whether that be the fact or not, and to the best of his information, hearsay, and belief, the wife of said James Lawrence, is not the daughter of his said wife's uncle."

There is nothing against this statement of the juror.

We think, then, that the Court was right in overruling the motion.

Judgment affirmed.

JACK HARRIS, plaintiff in error, vs. J. B. NICHOLS, defendant in error.

[1.] To sustain a motion for Magistrates to amend their return to a writ of certiorari, which from their certificate seems to be full, there must be an affidavit of its incompleteness.

[2.] Plea of failure of consideration may be sustained against the transferee of a note, who takes it with a full knowledge of the contract, and that the consideration is liable to fail.

Certiorari, from Catoosa Superior Court. Decision by Judge TRIPPE, at May Term, 1858.

Jack Harris, the plaintiff in error, brought suit in a Justice's Court against J. B. Nichols, on a thirty dollar note. Upon the trial on appeal, in the Justice's Court, the jury found for the defendant, and plaintiff excepted to said verdict, and applied for a certiorari, on the following grounds:

1st. Because the jury found contrary to the evidence.

2d. Because the jury found contrary to law.

3d. Because the Justice permitted the defendant to prove a contract that had been abandoned by both parties, and a new contract entered into.

4th. Because the Justice permitted a juryman to sit on the case who had expressed an opinion, who was excepted to, and exception overruled.

5th. Because the Justice permitted a juror to set on the case who had before been summoned and empannelled to try the cause at a previous term of the Court, who was excepted to, and exception overruled.

The certiorari issued, and the Justices transmitted their answer, together with a certified copy of the proceedings and evidence had before them in the cause.

The cause came on for hearing in the Superior Court, and upon defendant's counsel's reading the answer of the Justices, counsel for plaintiff (Harris,) objected to the same, on the ground, that it was not full and did not contain all the facts and the evidence on the trial before them; and that the transcript of the record certified to and sent up, was not full and complete, and moved that said Justices be ordered and required to answer over.

The Court refused the motion, and dismissed the certiorari, and affirmed the verdict and judgment of the Justice's Court. And counsel for plaintiff excepted.

H. J. **Spraybery**, for plaintiff in error.

A. T. **Hackett** and J. T. **McConnell**, *contra.*

By the Court.—**McDonald**, J. delivering the opinion.

[1.] The record furnishes no evidence that the return of the Magistrates is not full and complete. It does not sustain the petition of the plaintiff, but inasmuch as it is not controverted by affidavits, and inasmuch as there was no affidavit that the answer was not full and complete, to sustain the motion to answer more fully, the presiding Judge in the Court below, must be supported in the view he took of that branch of the case. The Magistrates say that they attach a copy of their proceedings and the evidence, which must be taken, as true, until the contrary appears.

[2.] There was abundant evidence to support the verdict. The note was given for corn, and payable to J. Elerson, or bearer, who transferred it to Jack Harris, the plaintiff. He not only received the note with a knowledge of the consideration for which it was given, but as there was some doubt about the corn for which it was to be given, he said to the principal in the note, "he need not mind to give his note, for if he did not get the corn he would not have to pay for it." The corn was subsequently levied on by a constable, with executions against the payee, and sold, and the defendant got none of it. The jury found for the defendant and the Judge of the Superior Court refused to set aside the verdict, and we affirm his judgment.

Judgment affirmed.

Thomas T. Wyche, and others, plaintiffs in error, vs. T. B. **Greene**, defendant in error.

[1.] If A. makes a deed, intending, that it shall convey property of which, a part be longs to himself, and a part to B., to B's wife for her life, with remainder to her children, and B. knowing this intention, receives the part of the property belonging to A., he is bound to carry out the whole intention, unless, at the time of so receiving this part of the property, he entertain the purpose to defeat the intention as to the part of the property belonging to himself, and it is known to A. that he entertains this purpose.

[2.] What is a mistake on one side, and a fraud on the other, is as much the subject of correction, as if it were a mistake on both sides.

[3.] It is not necessary that the *authority* to create a remainder in personal property, should be in writing.

In Equity, in Upson Superior Court. Tried before Judge **Cabaniss**, May Term, 1858.

This was a bill filed by Thomas T. Wyche, and Adeline W., his wife, and others, to have the following deed, executed byB att Wyche, in his lifetime, reformed:

The complainants allege in their bill, that at the time said deed was executed, the title to the negroes therein mentioned, was in the said Batt Wyche, and that Greene had notice of the same; and that when Batt Wyche drew and executed said deed of gift, it was his intention so to draft it, that it would convey to said Patience C., an estate for life in and to said negroes and increase, and at her death, an estate in fee simple to her children; and that Greene well knew that such was the intention of said Batt Wyche, and that he received said deed with such knowledge. That complainants were married in 1839, and that said Adeline W., wife of said Thomas T., is the daughter of said Patience C. Green, and entitled to said negroes, &c.

The deed is as follows:

STATE OF GEORGIA, *Montgomery County.*

Know all men by these presents, that I, Batt Wyche, for and in consideration of the love and affection which I have and bear to my well beloved daughter, Patience Clark Greene, and the issue of her body, do give, grant and relinquish unto the said Patience C. Greene and issue, four negro slaves, to-wit: Sally, Moses, Ellick and Sealy, together with all their increase, heretofore and after these presents, the rights thereof whatsoever, unto the said slaves and increase, to have and to hold the said slaves and increase as aforesaid, unto the before named Patience C. Greene and issues forever, freed and cleared of and from the claim of him the said subscriber.

In witness whereof, the said Batt Wyche has hereunto set his hand and seal, the 15th day of February, 1817.

BATT WYCHE. [L. S.]

In presence of
W. CONNER,
J. G. CONNER, J. I. C.

"I make an addition to the within deed, of five hundred dollars, in place of one small negro and other things.

Given under my hand this 6th day of October, 1817. To be paid next fall.

BATT WYCHE.

Test: WILSON CONNER, J. I. C."

"Received the 12th April, 1819, four hundred and fifty dollars of the above deed.

THOMAS B. GREENE."

"Received, June 2d, 1821, in full of the above, fifty dollars.
THOMAS B. GREENE."

Gibson; **Hill**; and **Peeples**, for plaintiffs in error.

Smith; and **Floyd**, *contra.*

By the Court.—**Benning** J. delivering the opinion.

The contents of the pleadings in this case, except the answer to the amendments made to the bill, are reported in *Wyche and wife vs. Greene.* (16 *Ga. R.* 49.)

The answer to those amendments, contain nothing important to the questions involved in the case, as it stands at present. Those questions all turn on the charge of the Court, and its refusals to charge. It is not necessary, therefore, to state the contents of that answer; for the same reason, it is not necessary to state the evidence.

The requests to charge made by the complainants, were as follows:

" 1st. If the jury shall believe from the evidence, that it is clearly and satisfactorily established, that the deed of Batt Wyche, conveying the four negroes, had, at the time it was first received by defendant, the additional clause on the back thereof, conveying the five hundred dollars in money, and defendant subsequently accepted and ratified said deed by receiving the money, and at the time of reception and ratification by the defendant, it was the intention of said Batt Wyche to convey said negroes and money to the wife of defendant for life, and at her death in remainder to her children, and at the time of such reception and ratification of said money and deed defendant knew of such intention, he is estopped from setting up a previously acquired right and title to said negroes in himself, as it would be a fraud upon the donor and the contract."

"2d. That this doctrine of estoppel is applicable to deeds and contracts of this sort, and that it applies as well when the donor, through mistake, believes he has a title to the property conveyed, as when he conveyed the same, knowing that he has no title."

"3d. If the jury believe from the proof that this property was originally placed in the possession of Mr. Greene by Wyche, soon after the marriage, that, without more appearing, amounts in legal presumption to a gift; yet, if afterwards the defendant accepted from Mr. Wyche, his father-in-law, a different disposition of this property, especially if founded upon the payment of a new cash consideration, by which he agreed to waive his rights, previously acquired by his possession and the gift, and by virtue of the amount mentioned on the back of the deed, acted under and acquiesced in the change of title made by Wyche, either expressly or implied, then he is bound by it, and he must stand upon the new arrangement."

"4th. If the jury believe from the acts and conduct of Wyche and Greene, or the statements of the parties, which had been submitted in proof to their consideration, that the intention of Wyche was known to Greene, and he accepted the deed, and took advantage of any provision, *in it or upon it*, made for his benefit, knowing the intention, it don't lie in his mouth to gainsay it now."

"5th. If this agreement was voluntary, still, if afterwards Greene, for a valuable consideration, however small, accepted this deed, and consented to take and hold title to the property under it, for the life of his wife, and afterwards remainder to his children, and he knew such was Wyche's intention, then he is bound by it, and it must be reformed and carried out, if the facts of the case are sufficiently proven."

"6th. If the jury believe that Wyche conveyed to Greene, by this deed, property, a portion of which already belonged to Greene, and Greene accepted the portion which did not belong to him, but to Wyche, then Greene is estopped from setting up in himself, as to the property already his, a title paramount to the deed, and to Wyche's title."

"The law is, that a party cannot take a benefit under a contract or instrument, and afterwards set up a title against the same; he must take the instrument with its benefits and burdens, or he must repudiate altogether and stand on his own title."

These requests the Court refused, and that was excepted to.

The Court then charged, among other things, as follows:

"It is not sufficient, that the mistake or misapprehension exists in the mind of one of the parties; it must be the act of all the parties to the instrument, and all must have participated in it, otherwise no relief can be granted."

"If the charge in the terms of the gift was made by Wyche, with a view of vesting a life estate in the negroes in Patience Greene, with a remainder in fee to her children after her death, and if the assent of Greene was necessary to divest himself of title, and to vest the remainder, that assent, to be operative, must have been in writing—the parol assent of Greene to the change in the terms of the gift, cannot vest the remainder in the negroes in the children of Patience Greene. A remainder in personal property cannot be created by parol, it must be done by writing. If the title to the negroes in dispute did first vest in Greene and wife by presumption of law, when they were sent home to them, and in Greene absolutely by virtue of his marital rights, then when Wyche attempted to change the terms of the gift, so as to vest the remainder in the children of Patience Greene, he could do it only upon the property being conveyed to him by Greene, or if the joint act of Wyche and Greene was necessary to create the remainder, that joint act must be evidenced by writing. If it was by parol on the part of Greene, the remainder there created is void, and the children of Patience Greene take nothing by it."

The charge was excepted to.

Let us suppose the following things true:

1. That Batt Wyche's intention was, that the deed, with its added clause, should convey $500, of his, and four negroes of Greene's, to Mrs Greene for her life, with remainder to her children.

2. That this intention was known to Greene when he received the $500.

3. That Greene, when he received the $500, harboured the purpose to hold on to the four negroes himself, and, thus to defeat Wyche's intention.

These things supposed true, then, we may say, that it must be true, that this harboured purpose of Greene's was known to Wyche when he parted with the $500, or it was not.

First, let us assume, that it was known to Wyche.

In that case, was Greene bound, or not bound, to carry out Wyche's intention with respect to the four negroes.

Not bound, clearly. For, in that case, there could be no ground to say, that Wyche's parting with his money, was *on condition;* viz: on condition, that Greene would permit the four negroes to go according to this, his, Wyche's, intention; and, therefore, there could be no ground to say, that Greene ought to be bound by the doctrine of "election;" because that doctrine rests on the presumption, that the donor intends his conveyance to be operative as to the part which is his, of the property conveyed, only, on condition, that the donee will permit the conveyance to be operative as to the part which is not his, but, the donee's.

Next, let us assume, that this harboured purpose of Greene's, was not known to Wyche, when he parted with his $500.

In that case, was Greene bound, to carry out Wyche's intention with respect to the four negroes? He was.

Because, in that case, we must assume; first, that Wyche's parting with his money, would be on the supposition, that his intention, as to the negroes, would be respected and carried out, by Greene; secondly, that this fact would be known to Greene.

This is not all. Wyche, at the time when he parted with this money, was the owner of much other property. Then, it is true, that with this property and the money, he was able at the time, to make a provision for Mrs. Greene and her children, equal to that contemplated by the deed. Who can say, that he would not have made it, had he been aware, that Greene harboured the purpose to defeat the provision contemplated by the deed? No man can say that he would not.

Even this, is not all. Wyche, soon after thus parting with this money, died intestate, whereby, Greene, in right of his wife, a daughter of Wyche's, became one of Wyche's heirs. Now, we must assume, that if Wyche had been aware of Greene's purpose to defeat the deed, he would not thus have died intestate, but would have made a will, and by it, would have given, at least the $500 and the share of his estate, which Greene inherited, to Mrs. Greene and her children.

These things being so, not to hold Greene bound to carry out Wyche's intention in the deed, would be to permit him, to perpetrate a fraud on Wyche—a fraud by which he, Greene, would be the gainer, and his wife and children, the losers; and the losers, perhaps, to the full extent of property equal in value to the four negroes.

There are decisions which go so far, as to say, that if the owner of property, stands by, in silence, while another person sells the property, the owner shall be bound by the sale, even though, he takes no profit from the sale. This may be —is, I think—going too far; but that the owner will be bound by the sale, in the case in which, he himself takes a profit from the sale, there can be no question.

But would it not be enough, to require Greene to account for the $500? No; because it is impossible to say, that Wyche, if he had been aware of Greene's purpose to defeat the deed, would not have made other provision for Mrs.

Greene and the children, equal in value, not only, to the $500, but, to that and the four negroes; and, it was Greene's fault, that Wyche was not made aware of this purpose.

[1.] We think, then, that Greene was bound to carry out Wyche's intention in making the deed, if, when Wyche parted with his money, he was not aware of Greene's harboured purpose to defeat that intention.

This then is the conclusion to which we come, on the assumed data. I need not stop to point out wherein it agrees, or wherein it differs, with the requests, or, with the charge.

I only add, that the conclusion will be found, I think, a sufficient solution of all the more difficult real questions in the case.

[2.] The Court's charge, that a mistake, to be the subject of correction, must be a mistake in which, all the parties to the contract, participate, was too absolute. If one of the parties to a contract, is mistaken in a matter, and the others know that he is, and do not apprise him of it, yet, the mistake, though not one on their part, is the subject of correction. The case becomes one, in which, there is a *mistake* in one of the parties to the contract, and a *fraud* in the others. Such a case is even more readily the subject of relief at his instance, than is a case in which, there is nothing but a mistake, although that be a mistake extending to all the parties.

[3.] So too, we think, this charge erroneous: that some *writing* of Greene's was necessary to create a remainder in the negroes, if the title to the negroes, had got into him. It is true, that this Court has decided, that a remainder in personalty, cannot be created, without a writing of some kind; but this Court has never decided that if the owner of property, whether real or personal, stands by in silence whilst another person's sells it, and such owner takes a benefit from the sale, he is not bound by the sale, be the terms of it, create what estate they may. And Greene's position was analogous to that of such an owner, if one hypothesis be true; viz, that he, when he received the $500, harboured the purpose to defeat what Wyche intended by the deed, and failed to communicate to Wyche the fact that he did.

We think, then, that there ought to be a new trial.

JOSEPH C. LITTLE, plaintiff in error, vs. ELBRIDGE BARLOW, defendant in error.

[1.] To say of a person he is a thieving puppy, is actionable.

[2.] If such words were spoken in a connection which do not import a criminal charge, but it does not so appear in the plaintiff's declaration, the declaration is not demurrable.

[3.] If words are not actionable, except as they are applied to the person and intrinsic matter in reference to which they were spoken, the declaration should contain averments to admit proof of them.

Slander, from Butts Superior Court. Decision by Judge CABANISS, at July adjourned Term, 1858.

This was an action for slander, brought by Joseph C. Little, against Elbridge Barlow.

The declaration contained two counts. In the first, the words charged to have been spoken were, that "*Joseph C. Little was a damn little thieving puppy,*" with an inuendo, that defendant thereby meant that plaintiff was guilty of the crime of theft or larceny, and was a thief.

In the second count the words charged, were "*if Thomas Foster had not killed House, and been put in jail, Joseph C. Little would now be as poor a man as I am,*" with an inuendo, that defendant thereby meant that a certain Thomas Foster charged with the murder of one Levi House, and confined in jail to answer said crime, had been permitted to escape therefrom by plaintiff, who had unlawfully and feloniously received money as a bribe therefor; and further meaning, that plaintiff had become rich by means of the said bribe.

A further count was added by way of amendment, to the declaration, in which the words alleged to have been spoken, were that "He," (meaning plaintiff,) "is a damn little thieving puppy. He is mean enough to steal a quarter of a dollar from a dead negro's pocket. If Thomas Foster had not killed House, and been put in jail in Jackson, Joe Little, (meaning plaintiff,) would be as poor a man as I am;" (meaning, as poor as defendant;) with an inuendo, that defendant thereby meant and intended, that plaintiff was guilty of the crime of theft or larceny, and that plaintiff had been jailor of the county of Butts, and while jailor, one Thomas Foster was committed and imprisoned upon the charge of the murder of one Levi House, and escaped from said jail; and defendant thereby meant that plaintiff had been guilty of the crime of aiding and assisting in the escape of said Foster from said jail, and of the crime of "*bribery*," while acting as jailor, and that he allowed and permitted the escape of said Foster for a bribe or reward, &c.

Defendant demurred to the declaration, on the ground, that the words therein charged to have been spoken, were not actionable.

The Court sustained the demurrer and dismissed plaintiff's action. To which decision counsel for plaintiff excepted.

D. J. BAILEY; and LYON & CARTER, for plaintiff in error.

HENDRICK & SUMMERS; PEEPLES and DOYAL, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The old rule, that words spoken in disparagement of the character of a person, which are susceptible of two constructions, are to be understood in their milder sense, is exploded. They are now to be interpreted in the sense that a person of ordinary capacity who heard them spoken, would understand them. They must, generally impute a crime to. the person of whom they are spoken, indictable and punishable in a temporal Court of criminal jurisdiction, or charge him with having an infectious disease, to be actionable of themselves. To charge a person with stealing, imports a felony. To charge a person with being a thief, is actionable, because a thief is one who steals. To say of him, that he is a thieving wretch; or a thieving puppy, is actionable, for it imports a felony, and so, any one of ordinary understanding hearing the words would interpret them.

[2.] If the words were used in relation or connection, which would negative the presumption, that the person speaking them intended to impute a crime, but it does not so appear on the declaration; the defendant must avail himself of it by plea in defense, unless it appears in the plaintiff's evidence on the trial. The declaration in this case contains nothing to repel the presumption that the words were maliciously spoken. We think that the Court ought to have overruled the demurrer in respect to the charge of thieving, made against the plaintiff.

[3.] The inartificial manner in which the declaration is drawn, shows great haste in the experienced draftsman. There certainly ought to have been a colloquium, so far as relates to the charge of bribery, which itself must be made out, if made out at all, by inuendo, applying the words to the person as well as the circumstances alluded to by the Speaker. These averments ought regularly to appear as inducement in the plaintiff's declaration, for it is necessary to establish by proof the extrinsic matter in reference to which the words were spoken, and to admit the proof, there must be averments. The declaration in this respect is amendable.

Judgment reversed.

EMILY HIGDON, administratrix, plaintiff in error, vs. J. H. BAILEY and others, defendants in error.

[1.] Parol evidence is admissible to prove that one of joint makers of a promissory note, was surety only.

[2.] There being no contract between a distributee of an estate and persons who become his sureties to the administratrix for property purchased at the sale, that the administratrix should hold on to his portion as an indemnity to such sureties, the fair and *bona fide* purchase of such share by the administratrix, without fraud or collusion to injure the sureties, does not discharge the sureties from their liability on the note on which they are surety.

Certiorari, in Gordon Superior Court. Decision by Judge TRIPPE, at April Term, 1858.

Emily Higdon, administratrix of the estate of Robert Higdon, deceased, brought suit in a Justice's Court, on six promissory notes, each for thirty dollars, against Hilary Higdon, and others. These notes were given by Hilary for property bought at the sale of intestate's estate, and the other defendants were his sureties. Hilary was not served with summons, having left the State, and some of the sureties were not served. Those who were served appeared and plead:

1st. That they were only sureties on said notes, and that the plaintiff was notified to sue the principal which she failed to do for more than three months after such notification, and by virtue of the statute in such case made and provided, they were discharged.

2d. That the plaintiff had effects in her hands, belonging to said Hilary, their principal, which she paid over to him, and permitted him to leave the State, without reserving a sufficient amount to pay these notes, whereby defendants were injured, &c.

3d. That the notes sued on had been paid off by said Hilary their principal.

Upon the trial on appeal in the Justices's Court, defendants offered to prove that they were only sureties. To this, plaintiff objected. The Court overruled the objection, and admitted the testimony, and this is the ground of plaintiff's first exception.

In support of the second plea, defendants proved that plaintiff purchased Hilary's share or interest in the estate of Robert Higdon deceased, and paid him therefor, the sum of seven hundred dollars. This was on 21st May, 1855. The notes in suit were dated 21st May, 1854, and due 1st of Sept. 1855.

Much other testimony was introduced in support of the above pleas, after which the jury retired and found for the defendants, upon which verdict the Court rendered judgment, and plaintiff excepted.

The plaintiff sued out a certiorari, and upon the hearing of the case in the Superior Court, the presiding Judge held that, under the record and testimony certified and sent up by the Justices, the defendants were discharged as sureties, and dismissed the certiorari.

To which decision counsel for plaintiff excepted.

A. L. Sheppard, for plaintiff in error.

Dabney, *contra*.

By the Court.—McDonald, J. delivering the opinion.

[1.] There was no error in admitting evidence to prove that the defendants were only sureties for Hilary Higdon. The evidence does not vary the written contract, and it was certainly within the spirit of our statutes which authorize an issue to be made up and tried between joint-makers of notes as to the surety-ship of one for the other.

[2.] We do not think, however, with the presiding Judge in the Court below that the facts proven, as they appear in the return to the certiorari, discharged the sureties from their liability on the note. The plaintiff had three months within which she was compelled to sue the principal, after the notice was given. If she sued him at any time within three months from the time the notice was given, she saved her remedies against the sureties. If he had removed from the State within that time, she was not bound to follow him out of the State to sue him, nor did she lose her remedy by her failure to sue him before he left the State, within three months of the notice, the omission to sue not being the result of collusion between the plaintiff and the principal in the note. 3 *Kelly*, 523. Sureties to promissory notes undertake to pay them at maturity, if the principal does not, and before our statute, holders were not compelled to sue, after notice to sue by the sureties. It was the duty of sureties to comply with their engagement and to adopt such measures to recover from principals, the amount paid for them, as in their judgment, their interest required. This is their remedy now, if the notice authorized by the statute cannot avail them.

There is nothing in the purchase by the plaintiff, of the interest of the principal in the notes, in his deceased father's estate, to relieve the sureties. He had a right to sell and the plaintiff had a right to purchase. There was no legal impediment to a fair sale and purchase. There is nothing in the record to show that there was any agreement or understanding between the plaintiff and the defendants, and the principal Higdon, that she should retain in her hands for their indemnity the portion coming to him from his father's estate. She was bound according to law to pay to him his share of the estate of her intestate, as soon after the expiration of twelve months, as the debts were paid, and nothing could relieve her from the obligation, except the restraint of legal process or his consent. If she thought proper to advance to him his portion, (if it was an advance,) if done without fraud or collusion for the purpose of depriving the defendants of a legal right, and there is nothing of the sort apparent in this record, the sureties cannot claim to be discharged thereby. The charge of fraud in the circumstances is not well sustained by the record. The note sued on, bears date on the 8th November, 1854, and became due on the first day of September thereafter. The plaintiff purchased the interest of Hilary Higdon on the 21st May, 1855. He left the State on Sunday night, before June adjourned Term of the Superior Court of Gordon county, 1856. The notice to sue Higdon was given about the last of August or first of September, of the same year. Suit was instituted on the 24th February, 1857. One of the witnesses who testified to the notice, says Higdon had left or was about leaving the State, at the time the notice was given. According to the evidence, he remained in the State more than twelve months after his interest in his father's estate was purchased by the plaintiff, and several months after the maturity of the note. The most reliable evidence, that of the bailiff who had executions against him, was that he had left the State at least two months, before the notice to sue. And it appears also, that the object of giving the notice to sue Higdon, was that the other sureties might be sued, lest they should move off and leave the entire debt to be paid by him who gave the notice. It is our judgment, that there is nothing in the circumstances of this case as disclosed in the record, to discharge the sureties from their liability to pay the debt sued on.

Judgment reversed

WILLIAM S. TOWNSEND, plaintiff in error, vs. E. B. STODDARD & Co. defendants in error.

1. A Sheriff, in not taking bail under process in his hands requiring it, and making no reply to a rule to make him and sureties special bail, should, with his sureties, be held bound as special trial.
2. Declaration amendable being substantially correct; process calling party to wrong day, also amendable if defendant appeared at the time fixed on for the Court and moved in the case.

Complaint and Bail. In whitfield Superior Court. Decision by Judge TRIPPE, at April Term, 1858.

E. B. Stoddard & Co. sued out bail process against William S. Townsend, returnable to April Term, 1858, of Whitfield Superior Court.

At the term to which the writ was returnable, counsel for Stoddard & Co. moved that the Sheriff and his securities "be deemed and stand as special bail," he having failed to take bonds for defendant's appearance as required by law in such cases.

Counsel for defendants resisted this motion, and moved that plaintiff's action be dismissed on the grounds:

1st. Because no sufficient cause of action is set forth in plaintiff's declaration.

2d. Because the defendant is required by the process to appear at the Superior Court to be held in and for said county on the *second Monday* in April, when the time fixed by law for holding said Court is on the *fourth Monday* in April.

The Court refused to dismiss the plaintiff's action, but allowed them to amend the declaration and process, and granted the motion making the Sheriff and his securities special bail.

To which decisions counsel for defendants excepted.

WM. F. MOORE, for plaintiff in error.

HARDEN & TAYLOR; and SPRAYBERRY, *contra*.

By the Court.—McDonald J. delivering the opinion.

[1.] The Sheriff showed no cause against the rule to make him and his sureties special bail for the defendant, and having been in default in this respect, as appears by the recital in the order absolute making them special bail.

[2.] In regard to the motion to amend the declaration and process, it is sufficient to say that they were both amendable by statute.

The time of holding the Court had been but recently changed when the process was issued, and the Acts had not been published; yet, as the Legislature had made no provision for process issued during the time intervening the passing of the Act and its publication, it must be considered that the defendant was required, by the process, to appear at a time different from that fixed by the law. But he appeared at the legal time of holding the Court, and at which the process ought to have required him to appear, and actually by his counsel moved in the cause. The Court heard his motion and decided upon and ordered both declaration and process to be amended. The decision is in harmony with the spirit of the statute of amendments, and the defendant is in no manner prejudiced by it. In fact, his appearance was a waiver of defects and errors in the process calling him to the Court.

Judgment affirmed.

Russell H. Cannon, administrator of Nathaniel H. Bullock, deceased, plaintiff in error, vs. **Alexander G. Bullock**, defendant in error.

1. A new trial will not be granted on the ground that a member of the jury

who tried the cause was a relative of one of the parties, especially if the counsel moving it knew there was a relationship, but forgot it until after the verdict was rendered.

2. It must appear that grounds taken in a motion for a new trial, were warranted by what took place in the cause.

3. When there have been three concurring verdicts for the defendant, and on the last trial the evidence in his behalf is strengthened and warrants the finding of the jury, a new trial will not be granted.

Motion for new trial, from Cass county. Decided by Judge TRIPPE at March Term, 1858.

This was a motion, on the part of Bullock, for a new trial, on the ground that one of the jury who tried the case was of kin to defendant's intestate, which was not known to or recollected by counsel when they struck the jury, their client being absent, and which was supported by the affidavits of counsel. Counter affidavits were submitted, and after argument, the presiding Judge granted the motion for a new trial, and counsel for defendant excepted.

MILNER & PARROTT; and JOHNSON, for plaintiff in error.

AKIN; and UNDERWOOD, *contra.*

By the Court.—MCDONALD J. delivering the opinion.

[1.] The Court below granted a new trial in this case on the single ground that one of the jurors who tried the cause was related to defendant's intestate; and an exception to the judgment of the Court granting a new trial on that ground is the only error assigned in the record. It appears that plaintiff's counsel had heard before the trial who the wife of the juror was; and he deposes, that if he had reflected, he would have known that he was brother-in-law of defendant's intestate, and that he struck the jury himself, the plaintiff being absent. The Court cannot consider such a ground as sufficient of itself to warrant the granting of a new trial, if, indeed, it ought to so be regarded under any circumstances. Parties may always send the list of the grand jury to the room and know of them if there be a relative or connection of either party on the jury. The Courts must hold parties to strict vigilance in guarding their rights in such cases, and not put the county to the trouble of a tedious trial, and the opposite party to the expense of protracted litigation, for causes that might confessedly have been obviated by proper reflection. We do not think that a new trial ought to have been granted in the cause on that ground; but it is insisted that if it ought to have been granted on any of the grounds taken in the motion, the judgment of the Court below ought not to be reversed.

[2.] There is nothing in the record to show that the first, second, third and fifth grounds taken in the motion for a new trial are warranted by the facts of the cause, or the rulings and charge of the Court. It would have been a sufficient reason for refusing the new trial, if the presiding Judge did not consider the grounds as authorized by the facts of the cause, his decisions or charge.

[3.] In looking through the evidence we are not prepared to say that the verdict ought to be set aside on the fifth ground taken in the motion, that the verdict is contrary to evidence.

There have been three concurring verdicts rendered by special juries, and the evidence given on this, the last trial, is much more favorable to the defendant than that submitted on the former trials, and would seem to warrant the finding of the jury.

Judgment reversed.

PARK E. ARNOLD, plaintiff in error, vs. REUBEN E. OSLIN and SAMUEL WALKER, endorsers, defendants in error.

If the generality of an interrogatory, is limited by another interrogatory, an answer to it as thus limited, will be sufficient.

Assumpsit, and motion for new trial, in Fulton Superior Court. Decision by Judge BULL, April Term, 1858.

The facts of this case are fully stated in the opinion of this Court, pronounced by Judge Benning.

GLENN & COOPER, for plaintiff in error.

EZZARD & COLLIER, *contra.*

By the Court.—BENNING J. delivering the opinion.

Park E. Arnold sued James F. Walker, as principal, and Reuben E. Oslin, and Samuel Walker, as endorsers, on a note and endorsements, of which, the following are copies: "$665. On or before the 25th day of December next, we or either of us, promise to pay A. J. Betterton, or bearer, six hundred and sixty-five dollars, if not punctually paid bearing interest from date, for value received of him. This April 9th, 1855."

[Signed] F. N. HARDMAN,
JAMES F. WALKER."

[Endorsed] "R. E. OSLIN, SAMUEL WALKER."

The plea of the two endorsers, was, that Arnold had given day of payment to F. N. Hardman, one of the makers, for a valuable consideration without their knowledge or consent.

The defendants offered in evidence, the interrogatories of Fleming N. Hardman and Jackson Hardman. The plaintiff, Arnold, insisted, that the cross interrogatories put to these persons, were not answered; and they, for that reason, moved to exclude the interrogatories from the jury. The Court overruled the motion; and to that, Arnold excepted.

The jury found in favor of Arnold, as to James F. Walker, and against Arnold, as to the endorsers, Oslin and Samuel Walker.

A motion was made for a new trial—the grounds taken in it, being, that the verdict was contrary to law and evidence; contrary to the weight of evidence; and, that the interrogatories were not excluded.

The last was the only ground relied on before this Court. Was that a good ground?

The first cross question was: "In the month of March, 1856, or any other time, when you saw the plaintiff about the note, how much money was paid? At the time, what was said by him? Did he not tell you, that if the endorsers were willing, he would wait, and give you time; if they were not, that he would place the payment as a credit, on the note? State particularly, all that was said about it."

The answer of F. N. Hardman, to this, was: "In the month of March, 1856, I paid said Arnold sixty-five dollars, to wait on said note twelve months. There was nothing said about the securities being agreed to said arrangement between the plaintiff, Arnold, and myself."

It is said, that in this answer, there is no response to the question: "At the time, what was said by him?" But that question, it is plain, is pointed and limited by the next one. "Did he not tell you, that, if the endorsers were willing, he would," &c.? And to this question the answer does contain a response. To this question, the words, "there was nothing said about the securities being agreed," &c., were a full response.

We think, then, that according to a proper interpretation of the interrogatory, the answer was full.

The other cross interrogatories were, we think, sufficiently answered; and if that were not so, yet, the materiality of those interrogatories, is not very apparent. It is needless to state them and the answers.

A. J. Hardman failed entirely, to answer the cross questions.

But it is plain, from their tenor, that they were not address-to him, at least, none except the last, which was: "Did not F. H. Hardman leave here, largely in debt? has he not been, for years, insolvent?" And the materiality of this, is not to us, apparent.

We think, then, that the Court did not err, in overruling the objection to the interrogatories.

Judgment affirmed.

ALFRED PERRY, plaintiff in error, vs. JOHN S. MARTIN, defendant in error.

Affidavits of the parties, under the Act of 1854, to protect land owners against intruders, &c., are not amendable *as pleadings*, under the amendment Act of 1854.

Summary proceedings, under the statute to recover possession of land, in Whitfield Superior Court. Decision by Judge TRIPPE, at May Term, 1858.

STANSELL; and HAMMONDS, for plaintiff in error.

JOHNSON & JACKSON, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

In *Cardin vs. Standly*, (20 *Ga. Rep.* 105,) this Court held, that in a proceeding under the Act of 1854, to protect land owners against intruders, and to give land owners a remedy in certain cases, the affidavits of the parties are not what constitutes the *pleadings;* and are, therefore not amendable under the Amendment Act of 1854. That decision covers and controls this case.

Judgment affirmed.

S. W. CARUTHERS, plaintiff in error, vs. H. J. SPRAYBERRY, et al., defendants in error.

Where the levying officer neglects to levy a *fi. fa.* in time to make the money by the next Term of the Court to which it is returnable, relying on the promise of defendant to pay it, and an injunction is interposed, having no merit in it, and on account of which the officer has not, *in fact*, been prevented from making the money, he shall be liable on rule to pay the money himself.

In Equity, in Catoosa Superior Court. Spring Term, 1858. Judge TRIPPE presiding.

McCONNELL; HACKETT; and CARUTHERS, for plaintiff in error.

SPRAYBERRY, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

We see no distinction between this case and the case of *Neal vs. Rice.* (11 *Ga. Rep.* 297.)

Whenever the Sheriff neglects to levy a *fi. fa.* until it is too late to make the money for the next Term of the Court to which it is returnable, and an injunction is granted, as in both of these cases, which has no merit in it, and on account of which the officer has not been prevented from collecting the *fi. fa.*, there is no great hardship in compelling him to pay the money himself. In every such case, he has to rely upon the word of the defendant, whether the injunction be interposed or not. And we can well imagine, that a contrary rule might lead to collusive combinations between the debtor and the Sheriff. At any rate, the point has been decided; and we feel disposed to let it rest, until revised by paramount authority.

Judgment affirmed.

JOHN MCINTYRE, plaintiff in error, *vs.* GEORGE W. CRAWFORD, defendant in error.

The verdict of the jury must be decidedly against the weight of evidence to warrant the Court to grant a new trial on the ground that the verdict is contrary to evidence.

Assumpsit, in Fannin Superior Court. Tried before Judge RICE, at May Term, 1858.

This was an action of assumpsit, by John McIntyre against George W. Crawford, for money had and received. The plaintiff had bought of the defendant his *possessions and mill*, on lot No. 70, in the 7th district and 1st section of Fannin county, and paid therefor the sum of one hundred and fifty dollars. He was subsequently evicted by summary proceedings under the statute, by the true owners, and this action was brought to recover the purchase money paid to defendant.

Defendant pleaded the general issue.

The plaintiff proved that he bought of defendant the possessions and mill on said lot, and paid therefor $150 00.

That defendant held said lot under Harris & Millen, of Savannah, as tenant at will, but had represented that when it was offered for sale, he had the refusal of it; and if he did not buy, they would pay him for his improvements; and that plaintiff would get them or get pay for them. He further proved that he only remained in possession from six to twelve months, and was evicted.

Defendant proved that plaintiff bought his *possessions;* and had knowledge of the claim or title of Harris & Millen.

The jury found for the defendant, and plaintiff moved for a new trial, on the ground that the verdict was contrary to law and the evidence.

The presiding Judge refused the motion for a new trial, and plaintiff excepted.

Fain; and Martin, for plaintiff in error.

Chastain; Underwood, *contra.*

By the Court.—McDonald J. delivering the opinion.

This was a motion for a new trial, on the ground that the verdict of the jury was contrary to law and the evidence. The Court refused the motion and the plaintiff excepted. The declaration consists of two common counts for money had and received. The object of the suit was to recover from the defendant the sum of one hundred and fifty dollars paid him by the plaintiff, for the possession of tract of land No. 70, in the 7th district of the 1st section of originally Cherokee now Fannin county, and a mill erected thereon, and from which possession he had been turned off by the rightful owners of the land.

The plaintiff insists that, by the contract of purchase, he was to retain the possession of the land until the owners sold it, and that then, by his contract, he was to be entitled to the preference in the purchase of a full title from the owners. The issue was on the contract as here stated. Several witnesses were introduced. The price at which the possession and improvements were sold, was proven, and as there is no controversy on that point, it is useless to refer to the testimony which establishes it.

James Kincaird was the first witness introduced to sustain the main issue. He testified, that the defendant offered to sell to him at the same price that the plaintiff purchased at, and informed him that he held the possession under an obligation from Harris & Millen, of Savannah, which bound them to let him have the refusal of the lot of land when they wished to sell it. This testimony does not even tend to prove the issue in favor of the plaintiff, for there was no statement that Harris & Millen agreed to give an assignee of the possession, the same privilege, or that the defendant proposed to guaranty any such right. He proves nothing in respect to plaintiff's contract.

The evidence of John Chastain, that he had heard the defendant say to Mr. Bridwell, that if he never got the money on a fifty dollar note which he held against the plaintiff, for the land, it would make no difference, as he had already got one hundred dollars out of him, by no means establishes the contract to be as contended for by the plaintiff. It is susceptible of the construction, that as defendant had been turned out of possession, he would not claim the fifty dollars of him.

The evidence of John B. Chastain has more to do with the issue. He says he saw the defendant at Morganton, and asked him why he had swindled the plaintiff so; the defendant replied that he had not swindled him, but that he had sold him his improvements and mill; that they were worth one hundred and fifty dollars, and that he, defendant, held an obligation against Harris & Millen, of Savannah, that if he did not get the land at woodland price, they were to pay him for his improvements, and that the defendant would get them or the pay for them.

If the statement of the defendant does not prove that a part of the right which he sold to the plaintiff, was a binding contract with the owners of the land, by which his vendee, the plaintiff, should have the land at woodland price, or that the plaintiff should be paid for the improvements, it is certainly strong evidence that, to induce him to make the purchase, he so represented to him. If so, there was certainly a fraud. This witness testifies that the plaintiff retained the possession of the property six or twelve months only after his purchase.

The plaintiff here closed his evidence, and the defendant introduced his son, Levi Crawford, who testified that he put the plaintiff in possession of the land for his father, the defendant; that the plaintiff said he did not know what was in the obligation which the defendant held on Harris & Millen for the land, but that he would get it and see; that he had money enough to pay for the land when the same came to sale, and that he had the preference; that from what McIntyre said, he seemed to know he was liable to be turned off at any time. This witness strengthens the presumption, that the defendant had, if not by the terms of his contract, by his representations to the plaintiff, strongly impressed him with the belief that he would be entitled to the preference at the sale of the land; and while he said that the plaintiff seemed to know he was liable to be turned off at any time, he does not state a single fact to sustain his inference.

The defendant introduced another son, who said that he heard the plaintiff say, he would be very proud to own the land; that he had sold his possessions in Tennessee, and had money enough to pay for the land when it should be sold by the owner, and that it would make him a very comfortable home, &c.; and that from what he said, he seemed to know he would be liable to be turned out of possession by Harris & Millen, at any time, though he had purchased and stood in the shoes of his father, the defendant. This witness also testifies, to his inference from the conversation, that the plaintiff considered that he was liable to be turned off at any time, but does not detail a syllable that was said to justify the inference.

The only witness who was present at the contract was Guthridge Garland, introduced by the defendant. He testified that he was present at the contract; testified that plaintiff bought the possession, and paid one hundred and fifty dollars, but gives no evidence that the plaintiff was to remain in possession until the land was sold, or that he was to have the preference of purchasing when it was sold.

The plaintiff introduced an acknowledgment by the defendant, to Harris & Millen, that he was their tenant, and would surrender the possession of the land whenever called upon, after having first the offer to purchase when they offer the land for sale.

The jury, upon this evidence, found for the defendant. The presiding Judge in the Court below heard the whole case, refused to grant a new trial, and the verdict is not so decidedly against the weight of evidence, as to warrant us in overruling his judgment in that respect. It is probable that the defendant made unfair representations to induce the plaintiff to purchase, but the only witness present at the contract says nothing of them; and two witnesses testify that the plaintiff seemed to know that he was liable to be turned off at any time. The acknowledgment of tenancy to Harris and Millen, by the defendant, does not show that he had any assignable right to purchase, but it rather shows a personal unassignable privilege, and if the plaintiff saw this at the time of the purchase, he had notice of defendant's title. The judgment of the Court below must be affirmed.

Judgment affirmed.

WESLEY PLEDGER, plaintiff in error, vs. **ALFRED B. COULTER**, defendant in error.

On the trial of an action of deceit, in the sale of promissory notes with a representation of the maker's solvency, and a plea of the statute of limitations, the evidence was, that the notes fell due, more than five years before the commencement of the action.

Held, That, as the purchaser of the notes must have discovered the insolvency of the maker, at the time when the notes fell due, or, within a reasonable time thereafter, this evidence was sufficient to support the plea of the statute.

CASE, in Floyd Superior Court. Tried before Judge HAMMOND, at April Term, 1858.

The facts of this case are sufficiently stated in the opinion below, pronounced by this Court.

SHROPSHIRE; and UNDERWOOD, for plaintiff in error.

SMITH; and AKIN, *contra*.

By the Court.—BENNING J. delivering the opinon.

Pledger, the plaintiff in error, brought an action of deceit against Coulter, the defendant in error. The declaration contained two counts. In the first count, Pledger alleged, that Coulter, on the 1st of December, 1849, requested him to purchase of him, Coulter, two promissory notes made by Russell Renneau, for $280 each, bearing date the 5th day of January, 1848; one, payable to Coulter, on the 25th of December, 1848; and the other, to John J. Epperson, on the 1st day of May, 1849; that Coulter fraudulently intending craftily and subtily, to deceive him Pledger, fraudulently and deceitfully represented Renneau, to be a person of good circumstances, well worthy to be trusted, and well able to pay the notes; and, by means of these representations, induced him, Pledger, he not knowing to the contrary of them, to purchase the notes, at the price of $500; that in truth and in fact, Coulter then well knew, that Renneau was wholly insolvent, and unable to pay the notes, or, any part of them, but which did not come to the knowledge of him, Pledger.

The second count differed from the first, only in alleging, that Pledger paid Coulter, land, instead of money, for the notes.

Coulter pleaded not guilty, and the statute of limitations of four years.

The Court charged the jury; "That their first inquiry would be, whether the plaintiff was bound by the statute of limitations, and if so, they need not pursue their investigations any further, but should find for the defendant."

"That if Pledger knew of Renneau's insolvency, any time for more than four years before the commencement of the suit, it was his privilege, to bring suit within four years thereafter, but that he could not remain inactive for four years after such knowledge, and still retain his right to sue, unless he had been deceived, and lulled into such neglect, by the defendant Coulter, but if Coulter had procured the delay, he would still be accountable, although the rights of the party, might be otherwise barred."

The jury found for Coulter.

Thereupon, Pledger moved for a new trial, assuming as the grounds of the motion, that the jury had found contrary to law; contrary to the evidence; that the verdict was clearly and manifestly, against the weight of the evidence; that the Court erred in charging the jury, that their first inquiry would be, whether the plaintiff was barred by the statute of limitations, and if so, they need not pursue their investigations any further, but should find for the defendant; and that Pledger had, since the verdict, discovered new evidence.

This new evidence was that of James W. M. Berrien, and was to this effect; that, when Coulter sold a printing press to Renneau, he, Berrien, advised Coulter, to secure himself in the purchase money, as he, Berrien, had reason to believe, that Renneau was insolvent; to which, Coulter replied, that he intended to trade the notes, as soon as he could get rid of them, on the best possible terms. That, some two or three months afterwards, Coulter informed him, Berrien, that he had bought, of Wesley Pledger, the big spring lots, and had paid him a part, with the Renneau notes; that he asked Coulter, if he had endorsed them; to which, Coulter replied, that Pledger had required him to do so, but that he had refused, giving as a reason, to Pledger, that he would not insult a man of the standing of the presiding elder, by endorsing his notes; and, besides, that Renneau's note was better than his.

The Court overruled the motion, and that was excepted to.

First, then, is it true, that the verdict was contrary to the evidence; or, to the weight of the evidence?

There were two issues; first, whether Coulter was *guilty* of a deceit at all; 2dly, whether if he was, an action for it was not barred by the statute of limitations.

To notice the last, first. Is it true, that according to the evidence, or, to the weight of evidence, the action was not barred by the statute of limitations?

No exception was taken to the rule on this subject, as laid down by the Court. And it, certainly, was as favorable for Pledger, as it would have been, consistently with any view of the law. That rule was, that the suit, unless commenced within four years from Pledger's *discovery* of the deceit, was barred by the statute.

When, then, did Pledger discover the deceit? When he discovered Renneau's insolvency. When did he discover Renneau's insolvency? At least, when the notes on Renneau fell due, or, within a reasonable time, afterwards. Renneau's failure to pay the notes at maturity; or even the one first due, would, it is to be presumed, lead to such inquiries, on the part of Pledger, as would result in his discovery of Renneau's insolvency.

The 25th of December, 1848, was the day on which, one of the notes fell due; and the first of May, 1849, was the day on which, the other fell due. Then, on the 25th of December, 1848—certainly on the 1st of May, 1849, or, within a reasonable time thereafter, Pledger made the discovery, that Renneau was insolvent. What would be a reasonable time, thereafter? Surely three or four months would be.

We may say, then, that by the 1st of September, 1849, Pledger had acquired the knowledge of Renneau's insolvency.

Now when was the action commenced? On the 5th day of November, 1854, that being the day on which, the declaration was filed in office. But the 5th day of November, 1854, was not only, more than four years after the 1st of September, 1849—it was more than five years, after that day.

We think, then, that, according to the evidence, it is *not* true, that the action was not barred by the statute of limitations. We think, that, according to the evidence, the action *was* barred by that statute.

Thus thinking, it becomes unnecessary to enquire, whether it is true, that, according to the evidence, or to the weight of the evidence, Coulter was *guilty* of a deceit at all; or, to enquire into the value of the newly discovered evidence—that relating, exclusively, to the issue, whether Coulter was guilty of a deceit at all, or not.

Was the part of the charge excepted to, erroneous? If it was, we do not see in what the error consisted. Telling the jury, that their first enquiry would be, as to the question on the statute of limitations, was telling them, that they might, in the first instance, *assume* Coulter, guilty of the deceit. Surely, Pledger was not the party, to complain of this.

We think, then, that the Court was right in overruling the motion for a new trial.

Judgment affirmed.

RICHMOND J. TERRELL, adm'r., plaintiff in error, vs. JOHN McKINNY and wife, defendants in error.

[1.] It is not error to admit in evidence on the trial of an action of trover, a will under which the plaintiff claims title from the testator. Such will does not prove title in the testator.

[2.] This Court settled in this case, in the 16 and 18 *Ga. Rep.*, that the verbal gift over of the property in controversy was not a gift in remainder, and the Court ought not to have charged the jury that if they believed it was a gift in remainder, it was void; especially, as it is manifest that the donor did not intend that the donee for life should take more than a life estate.

[3.] The jury may find a larger amount of damages in an action of trover than those specifically alleged as the value of the property sued for, provided they do not exceed the amount alleged in the conclusion of the declaration.

[4.] Where there is conflicting evidence, and it preponderates in favor of the verdict, a new trial will not be granted.

TROVER, in Newton Superior Court. Tried before Judge CABANISS, March Term, 1858.

This was an action of trover brought originally by John P. Booth and his wife Martha Booth, against Richmond Terrell, for the recovery of a negro woman slave Letty, and her children, named in the declaration.

Pending the action, John P. Booth died, and the same proceeded in the name of his wife, until her marriage again with John McKinny, who was made a co-plaintiff. The defendant, Richmond Terrell, also having died pending the suit, Richmond J. Terrell, his administrator, was made a party defendant.

This case has been before this Court twice before. 16 *Ga. Rep.* 20, and 18th *Ga. Rep.* 570, which see for a more full statement of its facts.

On the trial, plaintiffs offered in evidence the will of Richard Hodges, the father of Mrs. McKinny, to the introduction of which defendant objected. The Court overruled the objection, and allowed the same to be read in evidence for the purpose, and only for the purpose of showing title in the plaintiff. To which ruling the defendant excepted. The 2d item of which will is as follows:

"I give and bequeath to my daughter, Martha Hodges, eleven negroes, named as follows. Mary and her four children," naming them and others, "and Letty; the last named in the possession of Mrs. Terrell, and to remain so during Mrs. Terrell's natural life, then to become the property of my daughter, Martha Hodges."

The defendant requested the Court to charge the jury, that if, from the evidence, they believed that Richard Hodges ever had title to the said negro Letty, and that when he put her into the possession of Mrs. Terrell, he intended it as a gift to her for life, and that he parted with the dominion of the said negro, or that he intended to do so, and that after the death of said Mrs. Terrell, the said negro should go to his daughter Martha, whether he used the word loan or not, it was an attempt to create a remainder by parol, and the title vested absolutely in Mrs. Terrell and her husband, and the remainder over was void, and they must find for the defendant. Which charge the Court refused to give, and defendant excepted.

After the charge of the Court, the jury found for the plaintiffs $7,100, to be discharged by the delivery of the negroes within thirty days; also $1516 00 for hire.

Whereupon counsel for defendant moved for a new trial:

1st. Because the Court erred in admitting in evidence the will of Richard Hodges.

2d. Because the Court erred in refusing to charge as requested by defendant's counsel.

3d. Because the jury found for the value of the negroes, a sum greater than that laid in the declaration.

4th. Because the verdict is against the evidence, and against the law.

The Court overruled the motion for a new trial, and defendant excepted.

J. J. Floyd, for plaintiff in error.

W. W. Clark & Ezzard, *contra.*

By the Court.—McDonald J. delivering the opinion.

This was a motion in the Court below, for a new trial, which the Court overruled, and the decision of the Court on that motion is assigned for error here. The action in the Court below was trover for the recovery of several negroes; Letty and her children. The plaintiff, Mrs. McKinney, was the daughter and only child of Richard Hodges, who, by his will, gave to her eleven negroes, and among them the woman Letty. By the will Letty was to be left in the possession of Mrs. Terrell, and to remain so during Mrs. Terrell's natural life, then to become the property of his daughter, Martha Hodges.

Richard Hodges married the daughter of Richmond Terrell, and the plaintiff claims that the woman Letty was given by Terrell to his daughter on, or subsequent to that marriage. The defendant denies the gift. Hence both parties claim through Richmond Terrell. Indeed, Richmond Terrell was the original defendant in the Court below, and he having died pending the suit, Richmond J. Terrell administered on his estate, and, as administrator, was made party defendant in the place of his intestate. After the jury in charge of the cause had rendered a verdict against the defendant in the Court below, he moved for a new trial on the grounds in the motion as set forth in the foregoing statement.

[1.] The first ground in the motion is, that the Court erred in admitting in evidence the will of Richard Hodges. It does not appear in the record on what ground the defendant objected to Richard Hodges' will, when it was offered in evidence. The presiding Judge allowed it to be received for the single purpose of proving title in the plaintiff, or in other words, to show that whatever title Richard Hodges held to the negro in controversy, passed, on his death, under his will as therein given. There was no error in that, for it certainly did not prove title in the testator. Whether he had a right to bequeath the negro was a distinct matter.

[2.] The request which defendant's counsel made of the Court in writing, to charge the jury, ought not to have been given. To have given it would have been in violation of the judgment of this Court as pronounced in this case, on two occasions, 16 *Ga.* 21, 18 *Ga.* 570. In the first of these cases, this Court held that there was no remainder created by parol; that it was not attempted to create one. The judgment pronounced in the last case is the same. I will barely add, that the very general terms used in the Act of 1821 relative to conveyances generally, *Cobb* 169, *might* include verbal gifts, and if so, as a less estate than an absolute unconditional fee simple estate was mentioned, the donee of the life estate cannot claim a larger one, unless the gift was obnoxious to the provisions of the first section of that Act. It was not the case in respect to this gift. There is no objection to the bequest as expressed in the will. That is legal, and it vests the property in the plaintiff in the Court below so far as the title of the testator was concerned.

[3.] The next ground in the motion for a new trial is, that the jury found, for the value of the negroes, a sum greater than that laid in the declaration. The verdict of the jury is for a sum larger than the aggregate of the specific values of the negroes, as alleged in the declaration; but the damages found are not so large as are alleged in the *ad damnum* clause in the conclusion of the declaration. The jury cannot find exceeding that amount, but they may find a sum equal to or less than that sum.

[4.] The evidence was conflicting in regard to the passing of the title of the woman Letty, from Richmond Terrell to his daughter on the intermarriage of Richard Hodges with her; but we are of opinion that the preponderance of it is with the verdict of the jury. The finding of the jury violates no principle of law.

Judgment affirmed.

JOHN H. GOLDEN, plaintiff in error, vs. THOMAS FOWLER, defendant in error.

[1.] The arbitrators in a case, were to have the powers and authority of arbitrators under the arbitration Act of 1856. *Held*, That they had power to examine a party to the arbitration, as a witness for himself.

[2.] Equity readily receives the "excuses of the mortgagor, not only for the purpose of giving him time to procure the money previously to the foreclosure, but also for the purpose of opening the foreclosure."

Motion to make award the judgment of the Court and exceptions thereto, in Fulton Superior Court. Decided by Judge BULL, April Term, 1858.

The facts of this case, and the points made and decided in the Court below, are sufficiently stated in the opinion of this Court.

MANNING, for plaintiff in error.

OVERBY & BLECKLY; and GLENN, *contra*.

By the Court.—BENNING J. delivering the opinion.

At October Term, 1857, of Fulton Superior Court, it was ordered by the Court, that all the cases pending between

Thomas Fowler and John H. Golden, in the Superior Courts of Fulton and DeKalb counties, should be submitted to the arbitrament and award, of Jesse M. Cook and Thomas M. Echols; and, if they disagreed, Edwin Paine was to act as umpire, to decide between them. The arbitrators were to have the powers given to arbitrators, by the Act of 1856, to authorize persons to submit controversies to arbitration, &c.; and the award was to be made, the judgment of the Court.

There were three cases pending, between Fowler and Golden, one, in DeKalb Superior Court, the other two, in Fulton Superior Court.

The case in DeKalb, was a case in equity, in which, Golden was plaintiff, and Fowler defendant; and in which, the bill stated, that on the 22d of Nov. 1855, Golden bought from Fowler, a tract of land, containing one hundred and eighty acres, more or less, lying in DeKalb county, it being, the South part of lot No. 185, in the fifteenth district of what, originally, was Henry county; that Golden was to give Fowler, $2,100 for the land; that as part of the payment for the land, Golden conveyed to Fowler, a 'city lot' in Atlanta, at $600, it being No. 45, on Marietta street; that, for the rest of the payment, he gave Fowler, his four promissory notes; the first for $250, due the 25th of December, 1856; the second for $250, due the 1st of April, 1857; the third, for $500, due the 1st of April, 1858; the fourth, for $500, due the 1st of April, 1859. That on the 22d Nov. 1855, Fowler delivered to Golden, his bond conditioned for titles to said land to be made to Golden, on the payment of the notes, according to their tenor and effect.

That Fowler, on the 30th of December, 1855, only five days after the first of the notes fell due, fraudulently procured one Nathan Clay, a constable, to levy on Golden's interest in the land, under a *fi. fa.* from a Justice's Court, which had been assigned to him, Fowler; that afterwards, on the first Tuesday in February 1857, Fowler fraudulently procured Golden's interest in the land, to be sold at Sheriff's sale; that, at said sale, Fowler publicly proclaimed, that he had sold said land to Golden, and had given Golden a bond for titles, but that Golden had failed to comply with his contract, and the purchase money was unpaid, and that he, Fowler, was then having the land sold for the purpose of perfecting title in himself again; that Fowler then bid off Golden's interest at one dollar.

That Golden had no notice or knowledge of the levy and sale, until on or about the 2d of March, 1857; which was about a month after the sale.

That the Sheriff had not, as Golden believed, yet executed a deed to Fowler, but would, as Golden was advised and believed, execute a deed to him, unless he should be enjoined from doing so; and that Fowler would trade the notes, unless he was restrained from trading them; that Fowler threatened to trade the notes, the consideration for the land, to innocent purchasers, so as to harrass Golden, with suits, and in the end, to compel him to pay notes for which, no consideration had been received.

The bill prayed, that the Sheriff might be restrained from making a deed to Fowler, if he had not made one; that Fowler might be restrained from trading the notes; that if a deed had been made to Fowler, it might be declared *void;* that the notes might be delivered up and cancelled, and that $600, with the interest thereon, should be decreed to be paid to Golden, as the purchase money, or damages, sustained by Golden, in the premises; and that he, Golden, might have such other and further relief, as the nature of the case might require.

Fowler answered the bill.

Of, the two cases pending in Fulton, one was an action by Golden against Fowler, on an account for $104 50-100.

The other, was a case growing out of an order of Court, and an affidavit of illegality, made by Golden, both concerning a mortgage.

The order was as follows:

"Thomas Fowler, vs. John H. Golden. } *Rule Nisi*, to foreclose Mortgage, October Term, 1856."

"It appearing to the Court, that the respondent in the above stated case, has equitable sets-off, in the above stated case, and, that a rule absolute has been granted; it is therefore ordered, that the plaintiff show cause, at the next Term of this Court, why said rule should not be set aside, and the said sets-off be admitted; and it is further ordered, that the plaintiff be served," &c.

The rule absolute referred to in this order, was a rule by which, the Court after reciting what follows substantially in italics: viz: *That a rule nisi had been granted at April Term* 1856, *which required Golden to pay into Court, by the first day of that Term, (Oct. Term,* 1856,*) the principal and interest due on a certain promissory note made by Golden to Fowler, dated the 7th day of January,* 1856, *due one day after date, for* $800; *besides the costs of the proceeding; or to show cause, if any he had, why he should not do so; and which rule nisi declared, that in default of his doing so, the equity of redemption of Golden, to city lot, in Atlanta, known as the west half of lot No.* 3, *in block No.* 17, *containing the half of an acre; also, to forty-five acres, more or less, of lot No.* 191, *in the 17th district of what was originally Henry county; and also, to twenty-two acres two rods and fourteen poles of No.* 190, *in the same district; would be forever barred and foreclosed: And that Golden had failed to pay the said money due to Fowler, and had shown no cause why he ought not to have paid it;* ordered and adjudged, that the equity of redemption to said mortgaged premises, should be forever barred and foreclosed; and that Fowler should recover of Golden, $800, for his principal, and $42 for his interest, to that date, besides the costs.

Notwithstanding the granting of the *rule nisi*, to set aside this rule absolute, Fowler caused an execution to be issued on the rule absolute. And to this execution, Golden filed an affidavit of illegality, in which, he took the ground, that the rule absolute was *suspended* by the *rule nisi* to set it aside, and that, therefore, it was illegal for an execution to be issued on the rule absolute.

These three were the cases to which, the order of submission to arbitration, referred, as pending, between Golden and Fowler.

The *award* of the arbitrators, was, recitals omitted, as follows: "Finding the town lot No. 3, in block seventeen, in the possession of Fowler, and by his Fowler's own acts, we decree, that all the notes and mortgages, and all other liabilities, be null and void, and shall be cancelled to each party; and we further decree, that the same be done with the one hundred and eighty acres of land in DeKalb, also; and we further decree, that the said Thomas Fowler is to pay unto the said John H. Golden, the sum of $676 for his principal debt, and the sum of $45 dollars, for our services, and all other lawful costs which has accrued in the several cases; and that said several actions be entered settled, upon the payment of said sums; and all other matters, whether in the possession of Fowler, or any other person by assignment or otherwise, be null and void, or to be settled by said Fowler."

At April Term, 1858, Golden moved to have this award made, the judgment of the Court.

Fowler resisted this motion, contending, that the award was void, on the following grounds:

1st. That the arbitrators had held, that they were bound to proceed by the arbitration Act of 1855–6, and permitted Golden, to testify in his own behalf:

2d. That they awarded $45, to be paid, for their services, by Fowler, and nothing by Golden.

3d. That they ordered this sum to be paid to *Golden*.

4th. That the award (as Fowler believed and as he charged,) was not executed by all the arbitrators at the same time, or, in each other's presence.

5th. That the award does not dispose absolutely, of the suits referred, but directs the entry of "settled," to be made, only, on condition, that the several sums awarded against Fowler, are paid.

6th. That the award is outside of the submission in this; that it declares, in effect, that all the notes, mortgages, and all the other liabilities, held by said Fowler, growing out of the sale by him to Golden, of the DeKalb land, shall be void; thereby, setting aside a contract of the parties, which was not attacked, or put in issue, by any of the pleadings in any of the cases referred.

7th. And, outside of the submission in this; that it directs, that all other matters in the possession of Fowler and other persons by assignment or otherwise, bê null and void, or to be paid by said Fowler.

8th. And in this; that it directs Fowler, to pay Golden $676, when none of the cases embraces any demand or demands, in favor of Golden, for that sum; and the parties were not at issue touching any such sum; and the cases, singly or collectively, were not cases in which, so large a sum could have been recovered by Golden, against Fowler.

9th. That it cannot be determined in what case, the $676 was to be made the judgment.

10th. That the award is in the alternative, in some of its most important provisions.

11th. That the award is indefinite and uncertain.

12th. That the award is unintelligible.

13th. That the arbitrators erred in permitting the judgment of foreclosure to be opened; the defendant therein, having failed to allege or prove, any excuse for not resisting the foreclosure, before the judgment was rendered.

14th. That the arbitrators erred in hearing evidence, particularly, the evidence of Golden, himself; to show, that said foreclosure was erroneous, or, that sets-off or any other defence, existed against said mortgage.

15th. That the arbitrators, on the rule to show cause why the foreclosure should not be set aside, heard the evidence of Golden himself, and at his own instance; and also heard evidence of grounds for setting aside said foreclosure, other than the ground expressed in the *rule nisi.*

16th. That the arbitrators erred in not dismissing the affidavit of illegality, on the motion of Fowler; a motion based on the insufficiency of the matters alleged in the affidavit.

17th. That the illegality was one of the matters referred; and it is not disposed of, in the award.

18th. That the award is outside of the submission in this; it sets aside and makes void the mortgage on the city lot in Atlanta, and, the notes which the same was given to secure.

The counsel for Fowler, whilst reading these grounds to the Court," "took the occasion to descant at large upon their merits." "One of the counsel for Golden, made his speech against the exceptions, intending to leave the closing speech, to John T. Wilson," (another of his counsel,) "but his honor decided, that Golden had the conclusion, and that he would not hear two counsel in conclusion," and so, he excluded Wilson. To this, Golden excepted.

After the argument of Fowler's counsel, Golden "objected to the exceptions coming up in that shape; urging, that it should come up in the shape of a *rule nisi*, calling on Golden to show cause, if any he had, why the award should not be set aside."

"The Court determined, that the argument should proceed, as, the cause had been brought up and opened in that shape, by plaintiff's counsel, and as, the points, and the course of the argument, would be the same."

To this, Golden excepted.

Afterwards, the Court sustained the sixth ground of exceptions, and, "some other grounds of exception, and not definitely deciding, as to others," and "intimated, that the *rule* *nisi*, as stated by Golden's counsel, might have been the more regular and usual course, but, that he would allow the counsel to put it in that shape, (for the sake of the record, and to obviate the objections,) and make a motion to set aside the award, which order was granted without argument, as though, the argument had been had on the last, instead of the first, motion—the argument having been regularly gone through with, on all the points; and the Court, upon the suggestion of Mr. Manning, that he had expected to be followed by counsel on the same side, and had therefore, not been so full, allowed him then to resume, and continue, the argument, *ad libitum* in conclusion."

To all of which Golden excepted.

Were any of the grounds good, urged against the motion to make the award the judgment of the Court?

The first was, that the arbitrators held, that they were bound to proceed by the Act of 1856, and permitted Golden to testify for himself.

By the order of submission, the arbitrators were "to have the powers and authority given to arbitrators, under" that act.

The powers given to arbitrators under that act, authorize the arbitrators to examine the parties to the arbitration, as witnesses. The act says, that the parties "shall be competent witnesses," *sec.* 8, *p.* 223. This confers on the arbitrators, the *power* to examine the parties, as witnesses. True, it may also give the parties the *right* to be examined as witness. But it may well be, that a law shall, at the same time, give a power to the Court, and a right to the parties.

Arbitrators, under that act, then, would have had the power to swear Golden, as a witness, in his own behalf. If so, these arbitrators had the power to swear him in his own behalf, for they had the same power which those would have had.

Again: What Golden's testimony was, is not stated. It may be, therefore, that the testimony was immaterial. If it was, its admission was of no consequence.

We think that this, the first ground was not sufficient.

The second ground was, that the arbitrators awarded, that Fowler should pay $45, for their services, and Golding nothing.

This part of the award, was separable from the rest, and therefore, if wrong, it was no cause for rejecting the whole award.

The same may be said of the third ground.

The fourth ground was, that the award as Fowler believed and as he charged, was not *executed* by all the arbitrators at the same time, or in each others presence.

The order of submission does not require the award to be in writing. But even, if it did, there is no law of which we are aware. that says, an award shall be void, unless the writing merely evidencing it, shall be signed by all the arbitrators, at the same time, and, in each others presence. *Little vs. Newton*, 9. *Dowl.*

Besides, the truth of this ground is supported by nothing, but Fowler's mere belief.

The fifth ground was, that the award does not dispose absolutely, of the suits refered, but directs the entry of, "settled" to be made, only on condition, that the several sums awarded against Fowler, are paid.

It was of no consequence whether the suits should ever be entered, settled, or not. Without any such entry, they were finally disposed of. Another part of the award, has this comprehensive language; "that all the notes and mortgages, and all other liabilities, be null and void." All the suits must have been founded on "liabilities," of some sort, if founded on anything. This, therefore, knocks away the foundation of all the suits, and that gone, there, was no need of an entry of "settled."

The sixth ground was, that the award is outside of the submission in this; that it declares in effect, that all the notes, mortgages, and all the other liabilities, held by Fowlew, growing out of the sale by him to Golden, of DeKalb land, shall be void, thereby setting aside a contract of the parties, which was not attacked, or put in issue, by any of the pleadings in any of the cases referred.

The Court below held this to be a good ground.

Is it true, that the award is, in this particular, outside of the submission?

The *case* pending in DeKalb, was within the submission.

What then was that case?

The bill was framed with a double aspect. The two aspects, however, are, it must be admitted, somewhat indistinct and confused. In one of the two aspects, it is a bill to get rid of the Sheriff's sale to Fowler; in the other, it is a bill to get rid of the original sale; the sale, by Fowler to Golden. The prayer of the bill is, that the Sheriff may be restrained from making a deed to Fowler if he had not made one; if he had made one, that it shall be annulled; that Fowler shall be restrained from trading the purchase notes given to him, by Golden; that these notes shall be delivered up and be cancelled; and that Fowler shall pay Golden, $600, with interest, as the purchase money or damages, sustained by Golden; (doubtless, for the $600 city lot given by Golden to Fowler, in part payment of this DeKalb land.)

A cancellation of the notes and a payment of $600 in place of the city lot, would be equivalent to a nullification of the sale, and a restoration of the parties in *statu quo;* for Fowler was in *possession* by his purchase at Sheriff's sale, and in possession, clothed with the entire interest, both legal and equitable; legal, because, having given only his bond for titles, he had never parted with that; equitable, though he had parted with that by his bond for titles, yet he had got it again, by his purchase at Sheriff's sale; thus passing to him by that sale, all the interest which Golden had in the land.

The stating part of the bill, contains allegations suited to the part of this prayer, which asks for the nullification of the Sheriff's sale. This is admitted.

But it is said, that there is nothing in the stating part of the bill to authorize the prayer, which asks for the nullification of the original sale.

There is this in the stating part of the bill; that Fowler publicly proclaimed at the Sheriff's sale, that he had sold the land to Golden, and had given Golden his bond for titles, but, that Golden had failed to comply with his contract, and the purchase money was unpaid, and that he, Fowler, was then having the land sold, for the purpose of perfecting title in himself again; and, that he then bid off Golden's interest, at one dollar. Fowler, then, desired, to have his land, "again." That is, Fowler himself, wanted to rescind the sale. Golden having violated one of the terms of the sale, this term as to the first payment; and, in consequence of this desire, he was suffered to bid off the land, at the nominal price of one dollar when the land was worth $2,100. This is in the stating part of the bill.

Now, it was the right of Golden to take Fowler at his word, and say, agreed; let us rescind.

And, it may be considered, that he did this, in the prayer for a cancellation of the purchase notes, and for the payment to him of $600. The case might have been such, that it would be more proper, to ask for $600, the price at which, the city lot was rated, when conveyed to Fowler in part payment for the land sold by Fowler to Golden, than to ask for a return of that lot. It might have been the case, that Fowler had put valuable improvements on that lot.

We think, then, that there was enough in the stating part of the bill, to authorize the part of the prayer, which asks for a cancellation of the notes, and the payment of $600 in place of a return of the city lot.

The bill made a part of the *case* pending in DeKalb, referred to the arbitrators.

It follows, that if the arbitrators had annulled the original sale, they would not have gone beyond the submission. Now, that is what they did. They "decreed," that the notes should "be null and void;" or if they had passed out of Fowler's hands, that they should be "settled," by him; and they further "decreed," that Fowler should pay Golden $676. True, this is more than $600; but the overplus is due, it is to be presumed, to the rest of the lot, or, to the account on which Golden's action against Fowler was founded, or, to both.

We think, then, that the arbitrators, in declaring that these notes should be null and void, did *not* go beyond the submission; and therefore, we think, that there is nothing in this, the sixth ground of exception to the award.

What has been said on this ground, sufficiently disposes of the two next grounds, the seventh and eighth. If there is nothing in the sixth, there can be nothing in them.

The ninth ground was, that it cannot be determined in what case, the $676 was to be the judgment. True; and because, it was not the intention, that it should be made the judgment in any case. Nor was there anything requiring, that it should be made the judgment in any case. The award itself adjudged this sum to Golden, and that was a sufficient judgment for the sum.

The tenth ground was, that the award was in the alternative, in some of its most important provisions.

True, but we see no objection to that. The notes were to be null if, still in the hands of Fowler, if they had passed from his hands, he was to pay them, and not Golden. This is all one to Fowler.

We think, that the award may, by a little study, be found to be *intelligible* and sufficiently *definite;* and, therefore, we think, that there is nothing in the eleventh and twelfth grounds.

The thirteenth ground was, that the arbitrators permitted the judgment of foreclosure to be opened.

[2.] In *Coate on Mortgages*, 492, it is said, that "equity is ready to receive the excuses of the mortgagor, not only for the purpose of giving him time to procure the money previously to the foreclosure, but also for the purpose of opening the foreclosure, even after many year's quiet possession by the mortgagee, under an absolute decree of foreclosure, confirmed, signed, and enrolled." And see 495 *et seq.*, and the cases cited, especially, *Edwards vs. Cunliffe*, 1 *Madd.* 287; and *Ford vs. Wastell*, 6 *Hare*, 229.

There may have been very good reasons, why Golden did not resist the foreclosure, and these may have been shown to the arbitrators.

The Court itself, had granted a *rule nisi*, opening the foreclosure, in which rule, it was recited, that *it appeared*, that Golden had equitable sets-off against the mortgage. And it must be true, that it also appeared to the Court, that there existed some reason which seemed to the Court sufficient, to require the foreclosure to be opened to let in those sets-off, otherwise, the Court would not have granted the *rule nisi.* We must presume, that this same reason, whatever it was, was made appear to the arbitrators.

We see nothing then in this, the thirteenth ground.

The fourteenth ground is sufficiently disposed of, by what has just been said, in reference to the thirteenth, and by what was said, in reference to the first.

The fifteenth ground was, that the arbitrators, on the rule to show cause why the foreclosure should not be set aside, heard the evidence of Golden himself, and at his own instance; and also heard evidence of grounds for setting aside the foreclosure, other than, the ground expressed in the *rule nisi.*

The first part of this ground has been disposed of, in the disposition made of the first ground.

As to the second part, it is sufficient to say of it: first that it does not appear, what these other grounds were, nor, what was the evidence offered in their support; secondly, that it is not even alleged, that the arbitrators were influenced by this evidence, and allowed the grounds.

The sixteenth ground was, that the arbitrators overruled the motion of Fowler, to dismiss the affidavit of illegality; the ground of the motion being, the legal insufficiency of the matters alleged in the affidavit.

This action of the arbitrators, whether right or wrong, was a matter of no importance. If the affidavit of illegality, had been dismissed, still, the *rule nisi* would have remained, and in that rule, lay every thing that was in the affidavit.

The arbitrators in disposing of, what they did dispose of, disposed of the affidavit of illegality. Therefore, there is nothing in the seventeenth ground.

The eighteenth ground was, that the award is outside of of the submission in this, that it sets aside the mortgage on the city lot in Atlanta, and the note which it was given to secure.

If there were equitable sets-off proper to be allowed against the mortgage, they ought, by the submission, to have been allowed against it. If they had been allowed against it, the effect would have been to satisfy the mortgage, and the note to secure which, it was given, and thus, to make them both null and void.

The arbitrators then, would not have gone beyond the submission, if they had said, that the mortgage and note were to be considered as satisfied by the equitable sets-off. What they did say, was, that the mortgage and note should be "null and void," and "be cancelled to each party." One meaning of, to cancel, is, to annul. Taking it to have that meaning here, there is nothing in the expression of the arbitrators, inconsistent with the supposition, that they meant the equitable sets-off, to be the means or cause, by which, the mortgage and note, were to be "null and void;" "cancelled;" annulled. And if they meant this, they did not go beyond the submission.

We see nothing then in this, the eighteenth ground.

We, think then, that the Court erred, in overruling the motion to have the award, made the judgement of the Court.

It becomes unnecessary to consider the remaining points, in the case. They relate to form, not substance; and when the points relating to substance, have been decided in favor of a party, it is enough.

Judgment reversed.

JOHN E. PARKE, plaintiff in error, vs. N. G. FOSTER, trustee, defendant in error.

[1.] If illegal evidence be admitted to go to the jury without objection, it is no good ground for a new trial, especially where the effect is to benefit instead of injuring the party.

Evidence may be objectionable for one purpose, and in one state of the pleadings, and yet admissible for another purpose, and in another state of the pleadings.

[2.] Where a witness, confessedly a person of truth, has been twice examined in a cause, once by the plaintiff, and again by the defendant, and the answers are contradictory, that is entitled to most credit which was first in point of time, and therefore, nearest the transaction, and which is best corroborated by the facts and circumstances of the case.

[3.] A cash sale of property bears interest from date, although the day of payment be postponed until a particular event transpired.

Assumpsit, in Newton county. Tried before Judge CABANISS, at the March Term, 1858.

This was an action of assumpsit, brought by N. G. Foster, trustee of John W. Graves, against John E. Parke, to recover the amount of defendant's purchases at the sale of the property of Graves, made by plaintiff as trustee aforesaid.

The defendant pleaded the general issue and the statute of limitations.

Upon the trial, plaintiff offered in evidence, an exemplification of the record of the cause in chancery, of the trustee of said John W. Graves against his creditors, including the order making the creditors parties, and the order referring the case to referees or auditors.

F. H. Cone, examined by commission, testified, that he did not recollect the amount awarded and decreed to the claims of defendant, but it might be ascertained by the *per centum* allowed; had no recollection that defendant was present at the reference, but remembers that some of the creditors were.

Francis W. McCurdy was twice examined by commission, first on the part of plaintiff, then on behalf of defendant. In his first examination he deposed, that he was present in 1847, at the sale of the property of John W. Graves, by his trustee, the plaintiff; he kept the books, and acted as cashier; defendant purchased the property charged in the bill of particulars annexed; the sale was for cash; defendant did not pay him (witness) for the property he purchased, and if he paid any one, it did not come under his knowledge; his understanding from the parties was, that defendant being a creditor, the amount of his purchases was not to be paid till there was a settlement, and he was then to be allowed a credit for the amount coming to him, upon a *pro rata* allowance among all the creditors; heard this from defendant; such was witness' understanding of all the purchases of the creditors. Witness further understood from both parties, that such property as defendant bid off, was to be taken by the trustee and disposed of for the benefit of all the creditors, and it was to be charged to the person to whom it was eventually sold, which was generally done.

Upon his second examination, this witness, *McCurdy*, deposed, that he heard at the sale, that defendant was a creditor of John W. Graves; that he heard of no arrangement between plaintiff and defendant, by which defendant's purchases were to be held up until a settlement was had, nor did he know of any understanding between them, as to defendant's claims against Graves, and his purchases at the sale; never heard any conversation between them, or defendant, and any other person, as to what was to become of defendant's purchases; all his information, as to defendant's purchases lying over until a general settlement, was derived from the fact, that other creditors purchased property with the understanding that they were to share with other creditors at the final settlement, and that their purchases were not to be settled for until the result was known. All that witness knows, that would go to show that defendant purchased property as agent for the trustee, is, that defendant seemed to be busy in arranging and selling of property, and heard plaintiff say, that the defendant was worth a great deal to the creditors, in making property sell for a good price.

The testimony here closed.

The Court charged the jury, who found for the plaintiff; and defendant moved for a new trial, on the grounds that the Court erred in its charge to the jury, and that the verdict was contrary to law and the evidence.

The Court refused the motion for a new trial, and defendant excepted.

The charge of the Court, alleged as error, is fully set out, in the opinion of this Court, below.

Clarke & **Lamar**, for plaintiff in error.

Peeples, representing **N. G. Foster**, *contra*.

By the Court.—**Lumpkin** J. delivering the opinion.

This was an action of assumpsit, brought by the trustee of John W. Graves, against John E. Parke, to recover of the defendant, the amount of purchases made by him at the sale of Graves' property by the trustee; to which the defendant pleaded the general issue, and the statute of limitations. The jury found a verdict for the plaintiff; a motion was made for a new trial, and this writ of error is brought to reverse the judgment of the Court refusing to grant the motion.

1. The first complaint is to the charge of the Court. The charge as set forth in the motion for a new trial, does not correspond with the charge as given. Was the discrepancy material, we should be bound to look to the charge itself. It is in the hand-writing of the presiding Judge, certified by him to be correct, and of course authentic. His Honor instructed the jury, that if, upon the sale of the property by the plaintiff to the defendant, it was agreed that the day of payment should be postponed until it could be ascertained what was the *pro rata* share coming to the defendant, from the sale of Graves' property, Parke being a creditor, the statute of limitations commenced running from that time, and not before. And it is alleged in the application for a new trial, that Judge CABANISS added, that the settlement, or *pro rata* share, might be ascertained in a variety of ways; that is, by the parties, by bill in chancery, or by arbitration. It was not even affirmed that the *pro rata* share was ascertained in any one of these ways, in this case. Such, however, was the fact. It was suggested merely by way of illustration.

Now, let it be borne in mind, that the parties were at issue in this case, upon the plea of the statute of limitations, and upon nothing else. The witness, Francis W. McCurdy, in answer to the first set of interrogatories exhibited to him, testifies, that he was present in 1847, when the property of Graves was sold; that he kept the books, and acted as cashier; that John E. Parke bought the articles charged to him in the bill of particulars annexed to the writ; that it was a cash sale, but that Parke did not pay him, or any one else, for the negroes and other property purchased by him; and that he learned from Parke himself, from the conversation between him and the other creditors, that his indebtedness for things bid off at the sale, was to stand until his distributive share of the assets could be ascertained, and for which he was to be allowed a credit; and that such was the understanding of the witness with all the creditors who were purchasers.

This testimony justified the charge, and entitled the plaintiff to recover, wholly independent of the bill, reference and report, or award of the auditors, made in the premises. Had Parke moved for a nonsuit in this case, or claimed a verdict upon the ground that no settlement had yet been made, and that the suit was prematurely brought, according to the agreement, as proven by McCurdy; and when the plaintiff relied upon the award or report of the auditors, objected that he was not a party to that proceeding, the case might have assumed a different aspect. But no such point was made. The objection is to the charge of the Court, in reference to the statute of limitations—assuming that it was founded upon the chancery proceeding. The reply is, that the claim was taken out of the statute by the evidence of McCurdy irrespective of the bill.

And how has Parke been hurt by the introduction of this record, *without objection at the time from him?* In no way whatever. On the contrary, he got by it, without any plea of payment or set off, or any other such thing to justify it, a credit of $1,100 and upwards, upon his purchases. And if it be true, that he was no party to the proceeding in Court, so as to be bound by it, he is yet at liberty to sue the trustee, and recover whatever amount beyond that he may show himself entitled to. As an honest man, what more could he ask or desire? It is rather singular and somewhat significant, that Mr. Parke does not complain, or attempt to show that he was entitled to any more than was apportioned to him by the able counsel who awarded him, in common with all the other creditors, their forty cents in the dollar. It is also worthy of notice, that he alone, from aught that appears, seeks to disturb the settlement, and that, not by re-opening it for re-examination, but by having his large liability adjudged to be extinguished by the intervention of the statute, the demand being delayed, that no injustice might be done him. We apprehend that his rights were not prejudiced, for want of his presence, in the hands of the gentlemen who investigated and passed upon them.

I will add a single remark more respecting the charge of the Court. Suppose it had been made upon the record? It was permitted to go to the jury without objection; and whether Parke was a party to it or not, it was not wrong in the Court to treat it as evidence in the case. Had it been objected to at the time, it might perhaps have been shown, that Parke was present personally, or by his counsel. True, Judge CONE testifies that he has no recollection that he was present; but this is mere negative proof, which might be easily overcome.

2. The next error complained of is, that the Court charged the jury, that they must reconcile, if they could, the real or apparent conflict in the testimony of the witness, McCurdy, taken at different times; first, by the plaintiff, and some fourteen months afterwards by the defendant; and that in doing this, due regard should be given to the fact, that his first deposition was nearest the date of the transaction. We agree with the Circuit Judge, that this circumstance deserves some consideration. For, while it may be conceded, that we remember with more distinctness, the occurrences of boyhood and early manhood, when we have but few things comparatively to recollect, still, it cannot be denied, that after middle age, and when we become immersed in the business and bustle of life, events ordinarily fade away from our memory, just in proportion as they recede from us in point of time.

It is agreed on all sides, that the witness is a man of veracity. Both parties have made him their witness, and thereby endorsed his character for truth. And yet, in his second answers, he swears, that he knew of no arrangement between plaintiff and defendant, as he had before stated, and that he never heard of any understanding to that effect.

I must say, without undertaking to explain this contradiction, that the facts of this case strongly corroborate the truth of the first answers. The terms of the sale in 1847, were cash; McCurdy acted both as book-keeper and cashier. No money was paid by Parke to him, nor to the trustee, so far as he knows. *Why was it not paid?* Can any other explanation be given, except the agreement proven by McCurdy? Why was no effort made to enforce payment, until the *pro rata* share coming to this creditor could be ascertained? Is it not reasonable that such an agreement should have been made? Why compel a creditor to pay, when he was entitled to a portion of the proceeds? Mr. Parke was at the sale, and the purchaser of valuable property, to the amount of several thousand dollars. The demand is not only not collected, but not even liquidated by note. He even bid off other property, which was turned over to others, in order to make it bring its full value. Is it likely that such an understanding could have been made, with the creditors generally, and he be ignorant of it, and not participate in it? Of course, he would assent to it, it being for his benefit. Is it likely that he would have paid for his purchases, being a large creditor of the fund, and kindly offered this indulgence by the trustee? McCurdy, it is altogether probable, heard what he says he did, when first examined.

3. The Court charged the jury, that inasmuch as it was a cash sale, they should calculate interest up to the time the settlement was made, deduct the amount coming to Parke, and give their verdict for the balance. This was right. The auditors had awarded to the creditors forty cents in the dollar; and although not pleaded, the Court directed the credit to be allowed. The defendant, certainly, could ask no more. In strict law, he was not entitled to that.

4. It is in the last place insisted, that the verdict is contrary to law and evidence. We think it was in accordance with both, as we doubt not it is with the justice and equity

of the case; and take pleasure in affirming generally; as we do, the judgment of the Superior Court.

Judgment affirmed.

TERRENCE DOONAN, plaintiff in error, vs. Jane L. MITCHELL, admr'x., defendant in error.

[1.] Agency is not to be proved, by merely proving, that the person who is assumed to be agent, signed a receipt as such agent.

[2.] When one party introduces in evidence a part of a conversation with the other, the other may introduce the rest of that conversation.

[3.] It is no error in the Court, to refuse a request not authorized by the evidence.

Assumpsit, in Pike county. Tried before Judge E. G. CABANISS, October Term, 1857.

The facts in this case are fully set out in the opinion of the Court.

HAMMOND & SON, for plaintiff in error.

HARTFORD GREEN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The suit was brought by Terrence Doonan, against Mrs. Jane L. Mitchell, as administratrix of Samuel Mitchell, deceased.

The declaration contained three counts. The first was to the effect, that in 1846, Doonan and Samuel Mitchell, agreed that Doonan as the agent for Mitchell, should cause lot of land No. 77, in the 14th District of what was originally, Henry county, but is now Fulton county, it being a lot on which, a great part of Atlanta stands—to be divided by survey, into small lots, and then, should show, and sell, the lots. That, accordingly, Doonan caused this division to be made, and sold off, one hundred and thirty-one lots; that he was engaged in this business, until the 30th day of June, 1854; and that for these services, he was entitled to receive $2,482.

The second count was the common count for work and labor done, and money paid for Mrs. Mitchell, as administratrix, and for Mitchell in his lifetime, and for commissions on the sales aforesaid.

The third, was a *quantum meruit* for the same matters.

To this declaration, Mrs. Mitchell pleaded, amongst other things, a set-off, to the effect that she had placed in his hands, a large number of notes, to be collected for her, or, returned to her, of which notes he still retained a part amounting to about $1500; and had collected and not paid over to her, another part amounting to about $4,000; that Doonan retained another sum of about $800, which he had in hand at the time of the last settlement; and that he also owed her, $1,000, the price of one of the lots taken by Doonan himself, not sold.

Doonan introduced as evidence, the interrogatories of John Collier and Leonard C. Simpson. These proved, in substance, that Doonan began to act as agent for Samuel Mitchell, in 1846, and continued so to do, until April, 1854; that, during this interval, he sold many of the lots of land referred to in the declaration, made divers deeds for the same, was active in showing the land to purchasers, kept off intruders, and was a good agent generally; and, that his services were worth, $300 per year.

Doonan then produced a book containing what purported to be, ten receipts given to him, two, for certain of the notes which had been placed in his hands for collection, and eight, for money collected by him for her on others of the notes. Six signed by Hartford Green, as her agent, and four signed by John H. Mitchell, as her agent; and offered G. J. Green as a witness, to prove the handwriting of Hartford Green, with the view of showing, that Hartford Green was the agent of Mrs. Mitchell, or of Samuel Mitchell, and as such, signed the six receipts which had his name to them as her agent. G. J. Green was objected to on the ground, that agency cannot be legally proven, by proving the handwriting of the person who is assumed to be the agent—and, notwithstanding that plaintiff contended, that Hartford Green was not a competent witness, because of his being the attorney at law of the defendant, and, that this agency could be legally proved by the said Gilpin J. Green, as proposed. The Court overruled the plaintiff's motion, to introduce Gilpin J. Green, and held, that Hartford Green was a competent witness, to testify in the case for defendant, upon all the matters which did not come to his knowledge, by reason of the relation of client and attorney. To which ruling of the Court the plaintiff excepted.

Doonan, the plaintiff, then introduced Hartford Green, protesting, that Green was incompetent for the defendant, and, by him proved the handwriting to the said receipts; that he was attorney at law for defendant, and had been, from before 19th September, 1848; that the book aforesaid, contained the list of notes placed in Doonan's hands by him, as attorney for Mrs. Mitchell, and, the amounts collected by Doonan, and, the amounts paid over by Doonan; that John H. Mitchell acted as agent for Mrs. Mitchell, and, that the signatures to the receipts purporting to be signed by him, John H., for Mrs. Mitchell, were in his handwriting; that, two of the notes on Doonan, himself, one for $260, the other for $100, had not been paid or returned, as far as he knew; that the two notes for $20 each, on McCulloch had been returned to him, the witness; that, he supposed the amount paid over to him, and to John H. Mitchell, by Doonan, was $7,000 or $8,000; that he saw Mrs. Mitchell sign the powers of attorney, shown him; (powers of attorney to Doonan, to make "titles to ——, —— block number

——— in the city of Atlanta;") that, the bonds shown him, (bonds for title, made by Doonan as agent for Mrs. Mitchell, to purchasers of lots—parts of lot 77 aforesaid,) were filled up in the handwriting of Doonan; that he thought Doonan, being a merchant, could have filled up these blanks at ten cents each; that if he, witness, were to charge at all for so small an amount of labor, he should not charge less than one dollar each bond; that the notes stated in the bill of particulars of Mrs. Mitchell, were all given, as far as he knew, for lots in Atlanta; and that the only title, Mrs. Mitchell had, that he knew of, was a deed established in the Inferior Court of Pike county, and a deed from the administrator of the drawer of the lot.

On cross examination, he stated, that the receipt shown him, was signed by Doonan after the death of Samuel Mitchell, while the Atlanta property was in litigation; that Doonan told Mrs. Mitchell, that the purchasers of lots were frequently calling on him, to pay their notes given for the lots; that she said, that she did not desire to demand payment, until the difficulty about the title was settled; that if Doonan would take the notes, and receive such amounts as the makers might desire to pay, she would send them to him by witness; that she did so send them, and he, witness, made out a memorandum of the notes and wrote the receipt for them, and Doonan signed it, and took the notes. That he had heard Doonan say, that the collection of the notes gave him but little trouble, the purchasers coming to him at his store, to make their payments; at one, or more, times, when Doonan paid over to him, money, for Mrs. Mitchell, he suggested to Doonan, to retain something for his services, who replied, that he had deducted out only the amount paid out by him, and that he did not expect to charge Mrs. Mitchell anything, because her testator had been kind to him, in letting him have lots; Doonan, afterwards, said, that she had taken the business out of his hands, and had advertised the same, and that he disliked her doing so; that it was done because he had been unfortunate in his cotton transactions; that the estate had lost nothing by him, as he then had in his hands, after paying off the liabilities incurred on account of the business, only his own notes, and between seven and eight hundred dollars in money; that he intended to make out an account against her, and sue her, if she did not pay it, but that he should have charged nothing, if he had not met with such losses on cotton, and she had permitted the business to remain in his hands, but then intended to have what the law would allow him; that he, witness, had understood from Doonan, that many of the notes given in 1854, were on irresponsible persons; that Doonan was to assist John H. Mitchell in the sales, in 1854; that Samuel Mitchell died in 1847; that one per cent. on the amount collected by Doonan, would be a fair compensation for collecting—that attorneys usually charged five per cent. when there is no litigation.

The book referred to by the witness, showed a list of 131 notes, and that the notes had been turned over to Doonan by Mrs. M., to be collected or returned; it showed, that, of these notes, a large part had been returned to Mrs. M. and been receipted for, by her, through her agent, John H. Mitchell, and that the rest, except three, had been fully or partially paid to Doonan—the part fully paid being by far the larger part. As to the three, (of which, two were notes on Doonan himself, and the third, a note for $2 50 on ———,) the book did not show what had become of them.

The book also showed, that Doonan had received several sums for Mrs. M., in cash, apparently as, first installments on purchases of lots sold by him partly for cash, and partly on a credit.

Treating the notes retained by Doonan, as, all collected in full, and charging him with them, and charging him with the sums received by him, apparently as cash—first installments, and giving him credit for the amount of the payments to Mrs. Mitchell's agents, for which he held their receipts, as aforesaid,—the result would be, that at the last of those payments, there would be shown a balance against him, of between $3000 and $4000.

Doonan also proved by Pope, that for his commissions for collecting, he would be entitled to five per cent.

The amount collected by him, including what he paid over, and what he retained, was about $12,000.

The part of the evidence of Green, detailing the conversation between Mrs. Mitchell and Doonan, that happened at the time when Doonan was conditionally employed by her, to collect the notes, was objected to, and the ground of objection was, that this evidence would vary the receipt or contract of collection, subsequently made in writing. The Court overruled the objection, saying that such conversation was but a part of the conversation that had been drawn out by Doonan himself; and Doonan excepted.

The Court was asked by Doonan to charge, that if what Green testified to, as to Mrs. M.'s title, was true, then, that she had no title, and therefore, that the notes given by Doonan to her, were without consideration, and could not be charged against him. The Court refused so to charge, and Doonan excepted.

The jury found a verdict for the defendant for $1,203 82.

Doonan then moved for a new trial, the grounds of the motion being the judgments aforesaid excepted to by him, and several grounds which may be reduced into one—that the verdict was contrary to the evidence.

This motion the Court overruled, and Doonan excepted.

The Court below put the exclusion of G. J. Green's evidence, on the ground, that that evidence was offered merely to prove the agency of Hartford Green, in signing the six receipts, and to prove it, by only proving the signature to the receipts to be Hartford Green's—the Court thinking, that this was not a proper mode of proving *agency*.

[1.] We have to take it, as true, that this was the only object for which the evidence was offered. If so, its exclusion was manifestly proper.

So, the Court put the admission of the sayings of Mrs. Mitchell, uttered in the conversation between her and Doonan, on the ground, that the sayings made a part of a conversation, the other part of which, had been drawn out by Doonan himself.

[2.] Taking it as true, that these sayings were, the part of a conversation, the other part of which, Doonan had drawn out, they were admissible. This is indisputable.

Even if what Green swore, as to Mrs. Mitchell's title to the lot, was true, it was matter which proved, not, that she had no title, but, merely that the deeds with which *he* was acquainted, did not give her the title. She might have had other deeds.

[3.] It follows, that it would not have been right for the Court to tell the jury, that, if what Green swore as to Mrs. M.'s title to the land, was true, she had no title to it, and consequently, that D.'s notes given to her for a part of it, were without consideration.

The remaining ground is, whether the verdict was supported by the evidence. The verdict was for $1203 82 in favor of the *defendant*.

This verdict was, we think, rather too large. If we charge Doonan with all the notes not returned by him, and with all the money received by him, otherwise than on notes, as, received by him in first installments when these were to be in cash; and credit him, with the ten receipts he holds, the result will be, a balance against him at the date of the last of the receipts, of $3,720; according to one of Mr. H. Green's calculations (the counsel for Mrs. Mitchell,) and a balance of a sum something larger, according to another of his calculations. The data for the true balance, are all contained in the book. They, we think, will not justify a claim for any greater balance than this last sum. Indeed, we are not to be understood as *deciding* that they justify a claim to the whole of that sum, but, for present purposes, it may be admitted that they do.

How stands the counter claim of Doonan for services and commissions?

He was agent eight years, his agency commencing in 1846, and ending in 1854. The date of the last of the ten receipts, is also in 1854, probably the time of the termination of the agency, which was in that year.

His services were worth $300 per year, for the eight years, payable, of course, not later than at the end of each year. If then, the two calculations aforesaid, had, as they should have done, taken these items into the account, they would have allowed Doonan, in addition to what they did allow him, $300 per year commencing in 1847 and ending in 1854. If these sums had been thus allowed him, annually, they would have stopped *interest* on corresponding sums against him. Therefore, in giving him the benefit of them, now, in respect to those calculations, we must allow him interest on them, up to the date of the last receipt; that is to say, we must allow seven years interest on the first; six, on the second; five, on the third; four, on the fourth; three, on the fifth; two, on the sixth; one, on the seventh; and none, on the eighth.

Doing this, we shall have to allow him, for the whole interest, say, $588. Add this to the principal $300, multiplied by 8, which will be $2400, and we have $2988.

To this are to be added Doonan's commissions on the sums collected by him. These sums were, say $12,000, including what he paid over, and what he has still in hands, counting the notes he has in hand as collected.

One witness says, one per cent. was enough for commissions; another says, that five per cent. was not too much. Taking the average, we have three per cent. as the rate. This on $12,000 will make $360, which added to $2988 will make $3348. This taken from $3,720, leaves $372 only, in favor of Mrs. Mitchell, a sum much less than $1,203 82, the amount of the verdict. Taken from the larger sum found by Mr. Green's second calculation, it still leaves a balance in favor of Mrs. M., of considerably less than the verdict.

These estimates are not precise. The object of them is merely to show, that the verdict was too large, not, by how much, it was too large.

We think, then, that the verdict was larger than the evidence authorized it to be, and on this ground grant a new trial.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MILLEDGEVILLE,

NOVEMBER TERM, 1858.

Present—JOSEPH H. LUMPKIN,
CHARLES. J. McDONALD, } Judges.
HENRY L. BENNING,

T. J. BOTTOMS, plaintiff in error, vs. R. J. MITHVIN and W. F. SANFORD, Sheriff, defendant in error.

A plaintiff in execution present at a sale made by the Sheriff, of property of defendant, to satisfy the execution, is so far bound by an announcement made by the Sheriff at the time of sale, as to the payment from the proceeds of sale, of a lien claimed by a vendor of the property sold, that he cannot contest it, in a rule against the Sheriff for the money, unless the announcement was fraudulently or collusively made by the Sheriff.

Rule against the Sheriff. In Thomas Superior Court, at June Term, 1858.

Thomas J. Bottoms obtained a judgment against Redding J. Mithvin, in Thomas Superior Court. At the June Term of the Superior Court, he moved a rule thereon, against Wade F. Sanford the Sheriff, reciting that it appeared to the Court, that the plaintiff had levied on property sufficient in value to satisfy said *fi. fa.*, in time to have brought it to sale before the Court; and reciting also, that other *fi. fas.* against the defendant had been levied on other property and money raised, in the distribution of which the said *fi. fa.* was entitled to share. The Sheriff was required to show cause why he did not pay over the amount due on said *fi. fa.*, and he was further required to bring into Court the several *fi. fas.* in his hands against the defendant.

The Sheriff responded to the rule in an answer, and an amended answer, in which he stated that he had levied the said *fi. fa.* immediately after it came to his hands, on a house and lot in Fletchersville. He received a *fi. fa.* about the same time in favor of James H. Hays *vs.* R. J. Mithvin and Dixon Carroll, which had been levied by the former Deputy Sheriff. He had it levied on six hogs, by his deputy, which was the only property within his knowledge subject to the *fi. fa.* He sold the house and lot for $405, and the hogs for $19. From these sums he paid the amount of a vendor's lien, (on the house and lot levied on as is supposed,) amounting to $252, which he understood was to be paid by consent of parties. The balance he paid over to *fi. fas.* for costs and other *fi. fas.*, and $24 to the *fi. fa.* of T. J. Bottoms. The amount paid to the vendor never came to his hands, but was paid to him by Dixon Carroll, who controlled the *fi. fa.* of James H. Hays *vs.* Mithvin. The first time the lot was advertised to be sold, T. J. Bottoms objected to the payment of the vendor's lien. The respondent had no further conversation with him, but Dixon Carroll told him it was to be sold by mutual consent; to-wit: the consent of T. J. Bottoms, his own, (Dixon Carroll's,) and Burch & McLendon, attorneys for vendors.

The Sheriff's answer was traversed. It was proven that the sale was postponed once, because Bottoms would not consent to the payment of the vendor's lien on the house and lot, from the proceeds of sale, for the enforcement of which a bill in chancery was pending. On the day on which the sale was made, the Sheriff announced publicly, that the vendor had a lien for the purchase money, which would be first paid out of the proceeds of sale. The same witness who testified to these things, stated that he did not know whether or not Bottoms was present when the announcement was made, but he saw him there during the bidding, and urged him to bid up, but he did not bid. The witness *supposed* he did not bid, because he did not have the money. There was no arrangement such as that stated by the Sheriff, that the vendor's lien should be paid from the proceeds of the sale, between the attorneys for Johnson the vendor, Carroll and Bottoms.

About the time the property was crying at $390, the plaintiff, Bottoms, called on A. T. McIntyre, Esq., for information in relation to the sale, and asked his advice in the matter; but having an interest adverse to that of Bottoms, he declined giving the advice and information sought. The impression of the witness was, that the plaintiff did not understand his rights in the matter.

"The Court refused the motion and discharged the rule, holding, that the fund should be held up, until the question of the vendor's lien should be determined, and the Court ordered a proceeding for that purpose."

To this decision the counsel for plaintiff excepted.

A. R. ALEXANDER, for plaintiff in error.

A. H. HANSELL, by I. L. HARRIS, for defendant in error.

By the Court.—McDONALD J. delivering the opinion.

The issue made up on the Sheriff's answer and amended answer to the rule, does not seem to have been submitted to a jury. I presume the presiding Judge passed upon the facts as well as the law of the case, by the consent of parties. If so, was the decision in accordance with the law of the case?

It was a proceeding against the Sheriff to compel him, in a summary way, to pay over money in his hands, or which ought to have been in his hands, raised on the sale of the property of the defendant in execution. He sold the property for a sum of money sufficient to pay the execution of the plaintiff, and if there be no sufficient reason wherefore he does not pay the plaintiff the amount due him, the rule ought to be made absolute against him. It seems that the vendor of the house and lot to the defendant in execution, which were levied on and advertised, claimed that a part of the purchase money was still due him, and he insisted on his lien for the amount unpaid, and that he had filed a bill in equity to enforce it. The property had been advertised to be sold on a sale day prior to that on which it was sold, and the sale was postponed because the plaintiff would not recognize the vendor's lien, and agree that it should be paid.

On the day on which it was sold, the Sheriff announced publicly, to persons present at the sale, that the vendor of the house and lot, had a lien thereon for the purchase money, which would be paid from the proceeds of sale. It appears from his answer, that he was so informed by Carroll, who controlled one of the *fi. fas.*, and who, we suppose, became the purchaser of the property at Sheriff's sale, from the fact, that he extinguished the vendor's lien, without passing the money through the hands of the Sheriff. While the Sheriff was offering the property for sale, and after the announcement was made by the Sheriff, the plaintiff, Bottoms, was seen by two of the witnesses, in the company, and he endeavored to get information and advice from one of them, as to his rights in the matter. If he was present at the sale, which the presiding Judge in the Court below had a right to infer, and made no objection to the sale on the terms proclaimed by the Sheriff, he is not entitled to this summary remedy against the Sheriff, without proof of collusion between the Sheriff and Carroll, who made a false statement to the Sheriff, in respect to the consent of the parties to the payment of the vendor's lien from the proceeds of sale.

If Carroll became the purchaser, and still holds the property, what is to prevent a re-levy and sale, provided he did misrepresent to the Sheriff the agreement or consent of parties as aforesaid?

Upon a consideration of the entire case, we think the presiding Judge, on the hearing of the rule, gave a proper and legal direction to it.

Judgment affirmed.

EPHRAIM G. PONDER, plaintiff in error, vs. CARY S. COX, defendant in error.

[1.] A defendant, who has allowed a judgment to go against him in a Court of Law, even under a misapprehension of his right to defend in that Court, cannot obtain relief against the judgment by injunction, if he has a remedy in a Court of Law, by a cross action, unless, he shows that the plaintiff in the judgment is insolvent, or is out of the jurisdiction of the Court, so as to show that his remedy is inadequate.

[2.] The statute of limitations does not bar the suit of a negro for his freedom.

[3.] A negro brought into this State, in a state of temporary slavery, commits no offence under the Act of the General Assembly, which makes it unlawful for free persons of color to come from other States to this.

In Equity, in Thomas Superior Court. Decision by Judge [redacted], at June Term, 1858.

This was a bill filed by Cary S. Cox, against Ephraim G. Ponder, to enjoin the enforcement of a judgment at law, recovered by William G. Ponder, against complainant, and afterwards transferred to defendant.

The bill alleges, that in January, 1856, the complainant Cox, by his agent Thomas Dyson purchased of the defendant Ephraim G. Ponder, a negro man slave, a valuable blacksmith, named Price, or Giles Price, for the sum of eighteen hundred dollars: That the bill of sale was made to Dyson without noticing his agency, and that Dyson gave his own notes to defendant. One for $500, payable one day after date. The other for $1,300, payable January 1857; that defendant in said bill of sale warranted the soundness and title of the negro; that shortly afterwards Dyson reported to complainant that he had effected the purchase, and complainant executed and delivered to Dyson, notes corresponding in date and amounts, &c., to the notes he Dyson had given to defendant, and took from him a transfer of the bill of sale, and possession of the negro. In about twelve months thereafter, complainant received information that said negro, Price, was not a slave, but was a free person of color; that upon investigation, it appeared that said Price was born in the State of Maryland, a free person, and that some eighteen years before, for some crime of which he had been convicted in that State, he had been sentenced to be sold as a slave for the term of fifteen years; that he was bought by the defendant, who was about that time engaged in buying and selling negroes, and by him brought to Georgia, where he was sold, and after changing hands several times, had again fallen into the possession of defendant, who sold him as above stated to complainant.

The bill further alleges, that complainant had paid the $500 note. That understanding that the $1,300 note given by Dyson to defendant, had been transferred before its maturity to William G. Ponder, a brother of defendant, and that he threatens to sue them, and not wishing to see Dyson who had acted only as his agent in the business, sued; complainant applied to William G. Ponder, and substituted his note for Dyson's and that William G. Ponder had brought suit, against complainant upon this note and obtained judgment thereon; that believing, that under the circumstances, he could not make a valid defence at law against the suit thus brought he suffered said judgment to go against him. But immediately thereafter, William G. Ponder assigned and transferred said judgment to defendant, and complainant feels warranted in believing, and so charges that said pretended transfer of the note in the first instance to William G. Ponder, was collusive and fraudulent, and was a mere trick and arrangement, to deprive complainant of his defence at law.

The bill further alleges, that said negro, Price, by his next friend, has instituted proceedings to assert and recover his freedom, which are now pending in the Superior Court of said county; that defendant is proceeding to enforce the collection of said judgment, and has levied upon and advertised for sale the property of complainant, and which will be sold unless restrained by the order and decree of this Court.

The bill prays that said judgment *fi. fa.* be enjoined, until the trial and termination of the suit pending for the recovery of the freedom of the negro Price, &c.

To this bill defendant demurred for want of equity.

Besides demurring, defendant also filed his answer, in which he stated that he sold said negro, Price, to Thomas Dyson, on the 3d of January, 1856, and executed to him a bill of sale for the same; that Dyson in consideration of said purchase, gave to him his two notes, one for $500 payable to defendant, one day after date; the other for $1,300, payable to William G. Ponder, executor of James M. Vickers, deceased, due January thereafter; that at the time of said purchase, it was expressly understood by Dyson, that the $1,300 note was to be turned over to said William G. Ponder, executor, in lieu and satisfaction of a debt, which defendant owed said Ponder, as executor aforesaid. That Dyson did not disclose to defendant that he was buying said negro for complainant, or that he was acting as his agent in the purchase, nor did defendant know at that time, and never heard until long afterwards, that Dyson acted as his agent in said purchase, and has no knowledge now of such agency, except from what he has heard since the sale. Defendant further answers, that the $500 note was taken up by Dyson, and that complainant gave to William G. Ponder, his note for $1,300, not in lieu and satisfaction of Dyson's note, but as collateral security thereto, and upon this note thus given as collateral, suit was brought and judgment recovered by William G. Ponder against complainant, without any defence being filed thereto. Defendant admits, that after the recovery of the judgment, he settled or arranged the debt due by him to the estate of Vickers and William G. Ponder, executor, assigned and transferred to him said judgment against complainant, and he denies that there was any collusion between him and said William G. Ponder, in this arrangement, or that the same was done with any view to injure or defraud complainant, but the same was fair and *bona fide.*

Defendant admits the purchase, by his partner or agent of said boy Price, in the year 1838, in Maryland; that he was brought to Georgia and sold, and after passing through several hands, had again fallen into his (defendant's) hands; but he denies that he ever had any knowledge or notice, that said boy Price was not a slave for life; and avers that he now believes that he is a slave, and that complainant's title is good and valid. He admits that proceedings have been instituted to establish the freedom of said negro, and that the same are now pending, but he thinks and believes his claim to his freedom is unfounded; and he further alleges and charges that said proceedings have been instituted at the instance and by the procurement and connivance of the complainant.

The defendant further pleads, that said claim to freedom, is barred by the statute of limitations, more than four years having elapsed since the expiration of said alleged fifteen years of slavery into which said negro was sold.

Upon the hearing, the Court overruled the demurrer, and refused to dissolve the injunction, upon the answer, whereupon the defendant excepts.

McIntyre & Young, represented by Iverson L. Harris, for plaintiff in error.

Alexander and Burch, *contra.*

By the Court.—McDonald, J. delivering the opinion.

[1] The complainant's bill does not present a case which would justify a Court of Chancery to interpose in his behalf, by way of injunction. He has the warranty of title from the plaintiff in error, and there is nothing in the bill to show that his remedy at law on that is not adequate and ample. He claims however, that under the facts alleged by him, it is against conscience for the plaintiff in error to enforce the collection of the execution. That is not a sufficient ground of itself, for chancery to interfere with the proceedings in a Court of Law. There must be other equitable circumstances, to sustain it. It is manifest that if a defendant in a Court of Law, have the means of a perfect defence in that Court, and by his neglect alone, he fails to make it, however unjust the demand may be on which the plaintiff has recovered judgment, and however against conscience and morals it may be for him to compel its payment, a Court of Equity will not interpose, for his relief. In this case the defendant in error was sued and judgment was recovered against him, he set up no defence, although he was informed of the insecurity of the title to the negro, about the time the note given for him became due. He allowed the suit to proceed to judgment against him, and did not even institute a cross action for damages, although there was no legal impediment to a suit. From the statements of his bill, Dyson was his agent, and what was to hinder him from suing? He was not obliged to await a suit by the negro for his freedom. If the title was not good at the time of the sale, there was a breach of warranty. But the complainant excuses himself for not de-

fending in the Court of Law by alleging that he had supposed that the note had been transferred to the plaintiff in that Court, fairly and *bona fide*, before due, for a valuable consideration. He predicates his right to appeal, now, to a Court of Chancery, on the fact that the execution, shortly after it was issued, was transferred to the original payee of the note. The charge is made argumentatively. He "feels warranted in believing &c., and therefore charges." &c. This charge is far from being positive, and injunctions ought never to be granted, except the complainant is willing to make a strong case of irreparable injury, or of threatened or impending wrong, where the legal remedy is inadequate. Mr. Justice Baldwin properly remarked in a case before him in the Circuit Court of the United States, that "there is no power, the exercise of which, is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous, in a doubtful case, than the issuing of an injunction; it is the strong arm of equity that never ought to be extended unless to cases of great injury, where Courts of Law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones not coming within well established principles; for if it issues erroneously an irreparable injury is inflicted, for which there can be no redress, it being the act of a Court, not of the party, who prays it." *Bonaparte vs. Cam. & Am. R. R. Co., Baldwin's Rep* 217.

It has been decided in Kentucky, that a Court of chancery will not grant an injunction to stay a judgment, where the complainant affirms the contract, and seeks to liquidate the damages upon a warranty, or for fraud upon the sale. *Robinson vs. Gilbreth*, 4 *Bibb*, 184. I recognize that as correct in principle, and it has some application to this case. The complainant in this case, if he has not expressly affirmed, has not disaffirmed the contract, and appears to have been somewhat instrumental in bringing about the state of things, which places it out of his power now to disaffirm it. I am not prepared, however, to say, that what he has done, shall prejudice his claims to relief now, if his case were, in other respects such as to entitle him to it; for what he did, seems to have been suggested by that prudence which any vigilant man would observe to guard against future injury or loss. But the complainant does not show a single circumstance which entitles him, under the facts apparent on the face of his bill, to apply to a Court of Equity for relief. There is no allegation that the warrantor from whom his agent purchased the negro, is not able to respond. His insolvency or removal from the State, could alone justify the Court now to interfere by enjoining the judgment, until the question of title could be litigated between the complainant and defendant.

[2.] The bill charges that the negro for whom the note was given was not a slave, but that he was a free person, residing in the State of Maryland, and was prosecuted there for some offence of which he was convicted, and sold as a slave for the term of fifteen years, under the laws of that State; and that the defendant to the bill insists that the fifteen years, the term for which he was sold into slavery, expired more than five years ago, and that the statute of limitations has effectually barred his rights. The plaintiff in error insists on the statute as a bar. There is no statute bar to suits for freedom. There is no limitation to suits except by statute. There must be positive law to bar a right. It is true, that "length of time" raises a presumption against old and stale demands, but that presumption is not regarded when the party against whom it is to operate is "*non sui juris*," as a married woman or an infant. From the state and condition of a negro entitled to freedom, but held in slavery, no presumption can be raised against him. He is in perpetual duress during the time he is so held; and there can be no *legal* acquiescence on his part. Acquiescence implies knowledge and an agent capable of exercising a will, independent of others. This cannot be assumed in a case of a negro held in slavery.

The complainant alleges further, that the defendant (plaintiff in error,) insists that as laws of this State forbid domestic emancipation, no Court will release the negro from slavery.

The counsel for the ~~plaintiff~~ def't in error, argues before this Court, in addition, that the negro, is here in a state of slavery, and that he is here in violation of the Act of 1818, which declares that no free person of color shall come into this State, and that persons offending against the act, shall be subject to penalties in the act prescribed. A person who is not a voluntary agent cannot commit the kind of crime, which involves an act. There must in every such case, be "a joint operation of act and intention." A negro brought to this State as a slave, cannot be presumed to have any intention to violate our law, or freedom of action, in coming here, though he, in fact, be entitled to his freedom. There is no law against the introduction of free persons of color, subject to temporary slavery, into this State, by the persons having a right to their services as slaves, for a term of years. If such persons are brought here by their temporary owners, they remain here in violation of no law, and are subject to no penalty. They certainly do not remain in a state of slavery, after the expiration of their term of service, and the plaintiff in error cannot be sustained in the position, that his having brought the negro here, enlarged his title from an interest in him for a term of years, to an absolute estate in his person, during his life.

There is nothing in the case to support the argument, that this State will not give countenance to a policy of the State of Maryland to throw off her free colored population on States whose policy prohibits their reception there. There is nothing in the record which warrants the assumption, that the negro who was the consideration of the note sued on, was taken from Maryland or brought here, in furtherance of any such policy on the part of that State.

We think that the Court below erred in overruling the demurrer to the complainant's bill, and therefore order that the said demurrer be sustained, and the bill be dismissed, unless the complainant can so amend the bill as to show that his remedy at law against the defendant is inadequate by reason of his insolvency; or, of his having removed out of the jurisdiction, which proposition to amend must be supported by affidavit of the truth of the facts proposed to be introduced by way of amendment.

Judgment reversed.

GEORGE M. GRIFFIN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] The taking the impression of the key which unlocks the door of a storehouse, for the purpose of making or procuring a false key, with the intent of entering the house and stealing therefrom, is an attempt to commit larceny from the house, by the person taking the impression of the key, whether he intended to enter and steal, himself, or to procure another to do it.

[2.] If a motion be made to continue a cause on the ground of the absence of a witness, it must be shown that his evidence will be material on the trial of the cause; that the party cannot go safely to trial without such evidence; and in case of suspicion, the Court should look closely into the circumstances, and may consider what has passed before it in the progress of the cause, to determine on the merits of the application.

[3.] Where facts are *already in proof*, or a conversation with an accused party on trial, evidence of the repetition of the same conversation between parties attempting to lay a plan to detect him, is admissible.

[4.] If a person commit an act in the county where an offence, if perpetrated, must be committed towards the commission of that offence, he may be tried and convicted in that county, and he may be convicted whether he intended to commit the offence, or procure another to do it.

[5.] A request to charge the jury upon detached parts of the evidence, in order to show a want of jurisdiction in the Court, omitting a part which shows that the Court had jurisdiction, ought not to be given to the jury. But a solicitation to commit an offence is an act towards its commission.

[6.] If a person be indicted for an attempt to commit a crime, by using persuasions, and offering bribes to another to induce him to perpetrate it, the offence of "attempt" is complete in the county where the offence, if perpetrated, must have been committed, whether the person who used the persuasions or offered the bribes, was in the county at the time or not.

Misdemeanor, in Morgan Superior Court. Tried before Judge HARDEMAN, at ——— Term, 1858.

The facts of the case, and the grounds of exceptions to the rulings and decisions of the Court below, are sufficiently set forth in the opinion of Judge McDONALD, who pronounced the judgment of this Court, and in Judge LUMPKIN's concurring opinion.

A. H. H. DAWSON; and CONE, for plaintiff in error.

SOL. GENERAL, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

This was an indictment for misdemeanor, in the Superior Court of Morgan county. There were two counts in the indictment. The first count charged that the plaintiff in error, on the fourteenth day of August, in the year 1855, in the county of Morgan, with force and arms, did unlawfully, wrongfully, feloniously and with intent to steal, attempt to break and enter the storehouse of one Charles W. Richter, which storehouse was then and there situated in the town of Madison, in said county, and did then and there unlawfully, feloniously and wrongfully attempt to privately steal, take and carry away from said storehouse, divers jewelry, &c., of the value of five thousand dollars, and other things of value; and then and there deposited and being in said storehouse, and then and there the property of the said

Charles W. Richter, which said attempt then and there to commit larceny from the house, (an offence prohibited by law, and punishable by imprisonment and hard labor in the penitentiary, for any time not less than two years nor longer than five years,) was and is contrary, &c.

The second count in the indictment charged that the said plaintiff in error, in the county of Morgan, on the 14th day of August, in the year 1855, with force and arms, feloniously, unlawfully, and with intent to steal, did attempt to break and enter the storehouse of Charles W. Richter, situated in the town of Madison, in said county, and did then and there attempt as aforesaid, to break and enter said storehouse, with intent to steal as aforesaid, by unlawfully, wrongfully and privately taking the impression of the key which unlocked a door of the said store house of the said Charles W. Richter, and from said impression so taken, preparing a false key to fit said lock, for the purpose of unlawfully, feloniously, wrongfully and fraudulently entering, and through the agency of said Hiram T. Jones, to break and enter the said storehouse of the said Charles W. Richter, with intent feloniously, wrongfully, unlawfully and privately to steal as aforesaid, the goods, wares, jewelry, &c., &c., of the value of five thousand dollars, and other things of value, and these the property of the said Charles W. Richter, which said attempt to commit said offence of larceny from the house, (an offence prohibited by law, and punishable by confinement and labor in the penitentiary for any time not less than two years, nor longer than five years,) was and is contrary, &c.

The plaintiff in error was arraigned on the bill of indictment, and on his arraignment excepted and demurred thereto, and for cause of exception and demurrer, said:

1st. That there is no offence set forth and charged in said indictment, which is punishable by law, or that will subject him to punishment.

2d. That said indictment contains no statement of facts sufficient in law to charge the defendant with the offence of an attempt to commit the crime of larceny from the house.

3d. That the indictment contains no statement of facts sufficient in law to charge the defendant with the offence of an attempt to commit the crime of larceny from the house.

4th. That said indictment contains no charge or allegation which, if true, are sufficient in law to constitute the crime of attempt to commit larceny from the house.

[1.] This indictment is on the 2d section of the 15th division of the penal code, (*Cobb*, 844,) which is in the followlowing words: "If any person shall attempt to commit an offence prohibited by law, and in such an attempt shall do any act toward the commission of such offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted from executing the same, such person, so offending, shall be indicted for a misdemeanor, and on conviction thereof, shall, in cases where no provision is otherwise made in this code, or by law, for the punishment of such attempt, be punished," &c.

The Act does not describe the manner in which an attempt to perpetrate a crime shall be made to constitute the offence.

If the facts charged in the indictment to have been done, amount to an attempt, the offence of attempt to commit the crime is sufficiently charged, and the demurrer ought to be overruled. The indictment charges, that in the county of Morgan, the accused took the impression of the key, and prepared a false key from that impression, to unlock the door of Charles W. Richter's store, with the intention, through the agency of Hiram T. Jones, to break and enter the store and to steal. So far as the indictment is concerned, the offence, if an offence, is sufficiently charged to have been committed in the county of Morgan. But it is said that no offence is charged, but only an intention to do an act, and a preparation to do it. The intention wrongfully and feloniously to break and enter the storehouse of Richter, with the intent to steal, is very distinctly charged in the indictment. It is also alleged, that this was to be done through the agency of Hiram T. Jones. It is alleged that the accused took the impression of the key to the lock on the door of the storehouse, and that he had a key prepared. Here are two acts towards the accomplishment of a felonious object, and done with the intent to accomplish it. The having in possession a key, with the intent to break and enter a house, in order to steal, is a criminal act on the part of a person apprehended with it. *Penal Code, Cobb Dig.* 817. The case of *Rex vs. Sutton, 2 Str.* 1074, is a strong authority in support of this indictment. The defendant was convicted of a misdemeanor, for having in his possession iron stamps, with the intent to impress the sceptres on sixpences. The Court said, the "intent was the offence, and the having in his custody is an act that is evidence of that intent."

The object of the Act under which the plaintiff in error is indicted, is to punish intents to commit crime, if they are demonstrated by an act. The word "attempt" ordinarily implies an act, an effort, but the General Assembly, in this statute, uses it as synonymous with "intend," for it declares that if a person shall attempt to commit a crime, and in *such attempt* shall *do any act* towards the commission of such offence, &c. The accused, according to the bill of indictment, conceived the purpose of perpetrating the offence, and he did an act towards the commission of it, for it was an act to take the impression of the key, and that alone is sufficient to subject him to the law; but he prepared the key, and for the object, and so the indictment alleges. It is urged, however, by the learned counsel for the plaintiff in error, that if he intended to commit the crime through the agency of another person, that would only have made him accessory, if the offence had been committed by that other. In the case of *The King vs. Higgins*, 2 *East.* 5, the solicitation of another to commit a felony, was held to be an act, and if there was an act done by the accused, that would have made him a principal felon; if the offence had been committed, any act done towards its commission, would make the offence of "attempt" complete.

Several combined to forge an instrument, and each executed, by himself, a distinct part of the forgery, and they were not together when the instrument was completed, and they were, nevertheless, all held to be guilty as principals. *Wharton's Cr. Law*, 65 *;* 1 *Russ. on Cr.* 32 *;* 2 *British Crown Cases*, 307*; Ibid*, 304; 1 *Ib.* 446. (See *last case cited.*)

Griffin did an act towards the perpetration of the offence, and if the offence had been committed, he would have been a principal and not accessory. The demurrer to the indictment was, therefore, properly overruled by the Court.

[2.] After the demurrer was overruled in the Court below, the plaintiff in error moved a continuance of the cause, and in support of the motion deposed that, in consequence of the then recent finding of the indictment, (found at the Term of the Court at which the prisoner was put on his trial,) he had been able to summon no witnesses; that in the former case pending in said Court, he had summoned A. B. Luce, who resides in Savannah; that, at the previous Term, said Luce was in attendance upon the Court, but was then sick at home and confined to his bed; that by the said witness he expected to prove the good character of the defendant and his hand writing, and that letters which it would be attempted to be proved were written by him, were not in his hand writing; that he had no other witness in Court by whom he expected to prove all the foregoing facts; that he expected to have the witness in attendance at the then next Term of the Court; that said application was not made for delay, but that justice might be done, and he might be enabled to procure the attendance of said witness.

The presiding Judge refused the continuance on the ground, that this indictment is substantially the same as one which had been continued by the defendant for three several Terms of the Court. At another Term of the Court he announced himself ready for trial, and after a jury was empannelled, he absented himself from Court without leave, and forfeited his recognizance. That bill of indictment was *nol. pros'd* by the Solicitor General for a mere formal defect, and the one on which he was now to be put on trial was found by the grand jury for the identical misdemeanor, not at all varying the substance of the same. These are the reasons assigned by the Court for refusing the motion. The 35th common law rule applies to continuances of causes on the civil side of the Court, for the party continuing must depose that the witness resides in the county.

The Act of the legislature regulates continuances on the criminal side of the Court. *17th section of the 14th division of the Penal Code, Cobb's Dig.* 835. The Act requires that every person against whom a bill of indictment is found, shall be tried at the Term of the Court at which the indictment is found, unless the absence of a material witness or witnesses, or the principles of justice should require a postponement of the trial, and then the Court shall allow the postponement of the trial until the next Term of the Court; but the Court is vested with power to continue criminal causes from Term to Term, as often as the principles of justice may require, upon sufficient cause shown on oath. The defendant in the Court below had been indicted for a misdemeanor, and the Court had postponed the trial for three Terms, and at the fourth Term, when put on his trial, he absented himself without leave, and forfeited his recognizance, which was equivalent, as the presiding Judge remarked, to a fourth continuance. He showed no disposition, whatever, to come to trial. That bill was *nol. pros'd*, and he was indicted again, as the Judge said, for the *identical* misdemeanor, not varied in substance. The Court considered the entering of a *nolle prosequi* as nothing more than a necessary proceeding to amend, in matter of form, the old indictment, and it became his duty, as administrator of justice and the law, to examine well the grounds on which the continuance was asked. It was strongly urged in the argument, that the Court could not notice the former proceeding, though within his knowledge, because it would be like receiving a counter showing, which, it was said, is not allowable. This, I apprehend, is a mistake. It is not a rule, without exception, that a counter showing will not be heard. In England, a rule founded upon affidavit, is moved for the continuance of a cause, and cause is shown against it, and where there is no suspicion of the *bona fides* of the application, an affidavit in the common form is sufficient; "but where a suspicion arises, from the nature of the question, or *from contrary affidavits*, the Court will examine into the ground upon which the delay is asked; and have, in criminal as well as civil cases, refused to put off a trial, notwithstanding an affidavit in common form." *Imprey's Prac. K. B.* 362; *Rex vs. D'Eon*, 3 *Bur.* 1514.

The facilities with which continuances are obtained, is a great obstruction of justice. The delay of causes by the artful contrivances of parties, may involve their antagonists in irretrievable injury, and Courts ought to look closely into all applications for the postponement of the trial of causes, lest injustice be done thereby to parties or the public. The Court, we think, had the right to act upon his knowledge of what passed before him judicially, and to collect from that and other circumstances, the object and motive of the party in moving the continuance. The statute entitles the party to a continuance of the cause, for the absence of a material witness at the Term of the Court at which the bill is found, if he is not in default. Afterwards, the Court *has the power* to grant continuances as often as the principles of justice require it. The presiding Judge considered the accused as applying for a fifth continuance of the cause; and conceding it to have been the case, as the witness had been subpenaed, and was prevented from attending Court by sickness, if the showing had been sufficient in other respects, the trial ought to have been put off.

We will examine the affidavit in connection with the facts stated in the decision of the Court, upon the application. That he had not time to subpena witnesses, in consequence of the recent finding of the bill, is not sufficient; for the same issue was to be tried which had been made on the *nol. pros'd* bill, and it does not appear that he had not summoned witnesses to attend on the trial of that issue. On the contrary, it appears that he had summoned the absent witness, Luce. In that part of the showing it does not appear that there were witnesses material to his defence, absent. The affidavit makes another ground, and it is, that Luce had been subpenaed in the former case; that he was sick at home, (in Savannah,) confined to his bed; that he expected to prove by him his good character, and his hand writing; and that certain letters, which it was supposed would be offered in evidence against him, were not in his hand writing; that he had no other witnesses in Court by whom he expected to prove *all* the foregoing facts. The terms of the affidavit imply, that he had witnesses in Court by whom he could prove some of the foregoing facts. All the proof he expected to make by the absent witness, was such as may be usually made by numerous witnesses; viz: character and hand wri-writing. This is not shown to be an exceptional case. It will not do to say, that when the matter to be proved is such as, from the nature of it, may be proven by many witnesses the absence of a single witness whose evidence would merely corroborate the rest, would warrant the continuance of the cause.

It might be important when there is likely to be an equiponderance of evidence, or any thing like it, in the contested question, but that does not appear to be the case here. There is an absence of statement to that effect. To allow a rule, of the kind contended for, would afford a party to look out for a sick or decrepid witness, to subpena him to prove a fact which, within his knowledge, is susceptible of proof by sound and healthy persons, perfectly at his command. The affidavit does not say that he cannot go safely to trial without the absent witness. To entitle a party to a continuance on the ground of the absence of a witness, it must be shown that his evidence is material in the cause, that he cannot go safely to trial without it, and if there be a suspicion that the application is merely for delay, the Court should look closely into it, and the presiding Judge may rely upon his own knowledge of what has passed before him, judicially, to determine on the merits of the motion.

[3.] The State offered to prove, as introductory to other evidence, a conversation between the witness on the stand, Hiram T. Jones, and Charles W. Richter, in which was rehearsed a conversation between the witness and the defendant on trial, for the purpose of arranging a plan for his detection. This evidence was objected to by the prisoner; the objection was overruled, and the decision of the Court thereon was excepted to.

The witness gave evidence against the prisoner, of the same conversation, and its rehearsal in the manner stated, could have given it no additional weight or influence with the jury.

The conversation testified to by Richter, was for the same reason admissible.

The extract of the letter from Richter to Jones, contained no matter implicating the accused, but was admissible only as inducement to explain the conduct of the parties engaged in the detection of the defendant.

[4.] After the evidence was delivered to the jury, the counsel for the prisoner requested the Court in writing, to give the following charge to the jury:

That, admitting the making of the key would constitute the crime, yet if the jury believe from the evidence, the key, if made at all, was made in the city of Savannah, in the county of Chatham, and not in the county of Morgan, the defendant cannot be convicted in the county of Morgan, and they must therefore acquit the defendant.

Without discussing the soundness of this request, as a legal proposition now, it is sufficient to say, that the prisoner did an act in the county of Morgan towards the commission of the offence, and he may be tried, and if guilty, convicted in that county, of the offence of attempt, &c.

The next request is, that if the jury believe from the evidence, that the defendant took the measure of the key of the storehouse, yet if he did it, not with the intent to commit the larceny from the house himself, but to procure another person to commit it, he is not guilty of the offence with which he is charged. This request the Court refused to give, and his refusal so to charge is excepted to. For reasons assigned in this decision on the demurrer to the indictment, our judgment, it will be seen, is, that the Court committed no error in his refusal to give this request in charge to the jury. The defendant did an act which would have made him a principal, if the offence had been consummated.

[5.] The next request made of the Court to charge the jury is, that should the jury even believe from the evidence, that the defendant persuaded the witness, H. T. Jones, and offered bribes to induce him to commit the crime of larceny from the house, yet such persuasion, and such offer of bribes, does not make the defendant guilty of an attempt to commit larceny from the house. This request the Court refused to give in charge to the jury, and the counsel for defendant excepted.

Our reasons for overruling this assignment of error, are found in what is herein said on the demurrer to the indictment.

[6.] Two other requests were made of the Court to charge the jury, viz:

1st. That if the jury shall even believe that such persuasions and such offers of bribes were made, yet if this was done in the city of Savannah, and county of Chatham, the defendant cannot be convicted in the county of Morgan, but only in the county of Chatham.

2d. That should the jury even believe that the defendant wrote letters from the city of Savannah, and county of Chatham, directed to the witness, Jones, in other counties, persuading him to commit the crime of larceny from the house, the writing and sending of such letters do not constitute the offence of an attempt to commit larceny from the house; and especially does it not make the defendant guilty of that offence in the county of Morgan. The Court refused both these requests, and his decision is excepted to. These requests are both predicated on the assumption, that the verbal or written persuasions and offers of bribes to Jones, to commit the offence, were the only acts done by the defendant towards its perpetration, excluding also the acts done in the county of Morgan, and the sending by railroad the false key from Savannah, to Jones in Madison, which was proven to have been received by him in the county of Morgan. But independent of this, we hold that it makes no odds where the persuasion is used, or the letters written, whether in or out of the State, the offence of attempt is complete in the county where the offence, if consummated, must have been committed.

An attempt to commit treason in the State, or to excite a servile insurrection in any county in this State, is complete in the county where the offence must be committed, if committed, and he who does an act towards its commission, is triable in that county, though he may never have been in it. If the attempt be by letter, or such means, the transmission of the letter to the county, and its reception there, is an act in the county.

The Court charged the jury, that if they believed from the evidence, that the defendant took the measure or impression of the key, in the county of Morgan, and afterwards made or procured the key in the county of Chatham, and then sent the key to the witness, Hiram T. Jones, in the county of

Morgan, with a solicitation to him to commit the crime of larceny from the house, in the county of Morgan, the defendant is guilty of an attempt to commit the crime of larceny from the house in the county of Morgan. This charge of the Court is excepted to. Without a repetition of the reasons already assigned in support of our judgment, we will say, that this charge conforms to the law of the case.

Judgment affirmed.

Lumpkin, J. concurring.

The second section of the 15th division of the Penal Code is, that "if any person shall attempt to commit an offence prohibited by law, and in such attempt shall do any act toward the commission of said offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted from executing the same, such person so offending shall be indicted for a misdemeanor, and on conviction thereof shall, in cases where no provision is otherwise made in this code or by law for the punishment of such attempt, be punished as follows," &c. (*Cobb*, 844.)

Under this provision of the code, George M. Griffin was indicted and convicted in the Superior Court of Morgan county for an attempt to steal jewelry from the storehouse of one Charles W. Richter in said county of Morgan. The proof showed that Griffin, while in Morgan county, took the impression on tin of the key to the door of the building; that he returned to the city of Savannah, where he resided; made a key for the purpose of entering the storeroom; sent it in a box of fruit by express to one Hiram F. Jones, in Madison, Morgan county, who feignedly agreed to become the accomplice of Griffin in the perpetration of the contemplated crime; and who, after plundering the store of its most valuable contents, was to fire the building, in which Griffin was interested, and who had previously effected an insurance on the premises. Jones was then to meet Griffin at the 79 mile station, on the Central Railroad, and divide with him the spoils.

The proof being full and complete as to the foregoing facts, was the conviction of Griffin in Morgan county, for an attempt to commit larceny from the house, legal?

For myself, I entertain not a doubt upon the question.

What is an attempt to commit a crime? It is an endeavor to accomplish it, but falling short of execution of the ultimate design. In many cases it is difficult to determine the difference between preparations and attempts to commit crime. One may intend to commit a crime and do many things towards its commission, and yet repent of his purpose. The law gives to such an one a *locus penitentiæ.* One of the illustrations given in the books is, where a man buys poison and mixes it in the food designed for his victim, and places it on the table that he may eat it. If he take back the poisoned food before it is tasted, or an opportunity is given of swallowing it, awakened by a just consideration of the enormity of the crime, he will not be guilty of an attempt to poison. All that was done would amount only to preparation.

Is this Mr. Griffin's case? Did he countermand his repeated instigations to his supposed confederate urging him to the speedy execution of his diabolical scheme? Did he recall the key? On the contrary, had he not consummated his part of the preparations—all that he had to do except to share the spoils? and was he not waiting in hopeful anxiety to learn the result? To welcome the glad tidings that a large portion of Madison was in ashes—that Richter perhaps was beggared, and to wrench from the Insurance Office the rewards of his iniquity? Let his letters respond. History records that Nero fiddled while Rome was consuming under the flames kindled by this monster. Griffin's correspondence rescues this story from being branded as a fable.

If an attempt means an endeavor, trial, undertaking, effort to gain a point, then most certainly George M. Griffin, the defendant, was guilty of the attempt to rifle the storehouse of Charles M. Richter of its jewelry.

It turns out that the section of our Penal Code upon which this prosecution was formed, is a *verbatim* transcript from a similar provision in the Revised Code of New York. One Bush was tried in that State and convicted of an *attempt to commit arson.* The testimony on the trial was, that Bush, the defendant, requested one Kinney to set fire to one Shelton's barn, offering him a reward, and giving him a match for that purpose, *not meaning to be present himself at the doing of the act. It clearly appeared that Kinney never intended to commit the crime.*

Perhaps no two cases were ever more alike in every particular.

The Supreme Court of New York say—"The act imputed to Bush was, no doubt, an attempt to commit an offence. It is admitted that he endeavored to make himself an accessory before the fact. A mere solicitation to commit a felony is an offence, whether it be actually committed or not. This was held in *King vs. Higgins (2 East. 5).* In the case before us, there was more. The solicitation was followed by furnishing the instrument of mischief."

And so here, there was not only the solicitation, but the key was prepared and furnished for entering the store. And that is not all; the goods were to have been divided between the parties, Griffin to receive his share. It matters not to me whether the proof in this case would have made Griffin a principal or an accessory, provided the crime had been actually committed. He would unquestionably have been one or the other. He would have committed a felony or aided and abetted in its commission. He would have been guilty of a crime. Failing then of accomplishment as it has, by no act of repentance or drawing back on the part of Griffin, he is guilty of the attempt, no matter whether the successful result of that effort would have made him a principal or an accessory. And the maxim, that what a man does by another, he does by himself, whether true or not, need not be invoked to help out this case.

Was Griffin entitled to a continuance on account of the absence of the witness, A. B. Luce, who had been subpened and was unable to attend Court on account of his sickness, and by whom the defendant swore he expected to prove that the letters read against him on the trial were not in his handwriting?

Mr. Luce, the witness, lived in Savannah, where there must have been many others acquainted with the handwriting of Mr. Griffin. His counsel in the Court-house knew his handwriting, and were competent witnesses. Why were neither of them sworn on the trial? Could the testimony of Mr. Luce possibly have changed this verdict? It is impossible. For not only was the handwriting of the defendant clearly identified, but in reply to letters addressed to him, his answers were transmitted from time to time, and the key sent in the box of fruit, with such comments as no one who was a stranger to the plot could have made. There is no evading the force of these facts, unless it could have been shown that this was a conspiracy against Griffin, and that the allies of Jones were in Savannah to intercept the communications forwarded from Madison, and had answered them in the name of Griffin. Where is there a particle of proof to support such an hypothesis? Was the Post Master at Savannah examined to ascertain whether Mr. Griffin's letters were delivered to any one else? Mr. Griffin himself has never pretended that he was the victim of any such conspiracy.

Three times this prosecution had been continued before by the defendant. At the fourth term after announcing himself ready, and putting the country to the trouble of empannelling a jury, Griffin absented himself from the Court without leave, forfeiting his recognizance. To allow a further postponement of the case, under these circumstances, to procure the attendance of a witness whose testimony could not possibly vary the result, instead of being required by the principles of justice, would be to trifle with the criminal justice of the country.

The defendant objected to certain conversations and correspondence, going in evidence, which took place between Jones and Richter, he not being present. I would dispose of this assignment of error summarily, by remarking that these conversations and letters establish no fact against Griffin, and serve merely to connect and explain the trap that was set to catch this culprit, and in that view were admissible. It will be observed that there was no motion for new trial in this case.

Upon every question, then, made in this record, I vôte freely for affirming the judgment of the Circuit Court. I should be slow to believe that a person occupying the social position of this defendant could be guilty of the crime charged upon him in this indictment. But the fact once established, as it indisputably is, I would be the last to save him from the punishment he has brought upon himself. Let it not be said, to its disgrace, that the law is a respecter of persons. That while the poor man is incarcerated in the Penitentiary for stealing a flitch of bacon, to satisfy the hunger of his wife and children, the bank officers and others occupying high fiduciary positions, may rob by the wholesale and go unwhipped of justice. On the contrary, for the sake of the example, the higher the offender the more sure and unerring should be the blow. No class is privileged to monopolize crime with impunity in this country.

Benning, J. dissenting.

I dissent from two of the decisions made in this case.

1st. I think that the motion for a continuance, ought to have been granted.

The showing for a continuance was clearly sufficient, even his name; the receipt of the box containing the key from the Express company. As to this last however, I may ask, why was it not shown, that Griffin *delivered* the box to the Express company. That would have made out the case against him, completely. And that this was not shown, is calculated of itself, to suggest a suspicion that the fact did not exist. But I make one general answer; contrivance could have manufactured all of these circumstances: and the case is one which authorizes us, to suspect contrivance.

I think, then, that the refusal of the motion to continue the case, was a sufficient ground to require the granting of a new trial.

2d. The Court was requested in substance, to tell the jury, that if Griffin's intent was not to steal from the shop himself, but, by solicitation and bribery, to procure Jones to do it, he was not guilty of an attempt to steal from the shop. And the Court I think, ought to have granted the request.

The general rule is, that if A. procures B. to commit a crime, it is not A. that commits the crime, but B., and A. stands merely as B's accessory.

And this rule is founded on both what is true in fact, and what is true in law.

Procuring another to commit a crime, is in fact a different thing, from committing it yourself. Different words are needed to express it; different proofs, to establish it. It is also a different thing in law. The Penal Code, (2. Div.) when it speaks generally, declares, that he who perpetrates, (i. e. commits,) the crime, shall be a principal; and, that he who procures, counsels or commands the crime to be committed, shall be but an accessory. And when the code speaks more specially, (1. Div.) the only exceptions it makes to the rule, are, cases in which, the actual perpetrator is an infant under ten, an idiot, a lunatic, the wife of the procurer, his slave, or is some one acting in fear of him. In these cases, it makes the procurer of the crime, stand as its actual perpetrator.

And therefore it may be said, that in these cases, it is he who in law, commits the crime.

It is true, then, that, except in these special cases, if A. procures B. to commit a crime, it is not A. that commits the crime, but B., and A. stands only as B's accessory.

But if this be true, then it must equally be true, that, except in these special cases, if A. *attempts to procure* B. to commit a crime, and fails in the attempt, A. does not attempt himself, to commit the crime.

This is my conclusion. I know, that there stands opposed to it, a New York case, (4 *Hill*, 136.)

But first, what authority can a New York case be, on the construction of the Penal Code of Georgia. Secondly, that case is put on the maxim, *qui facit per alium facit per se*, and that maxim does not, as it seems to me, apply to such a case. It may be true, that who *does* by another, does by himself. But when A. procures B. to commit a crime, which of the two is it, "*qui facit*," "who *does?*" It is, in all cases, except the special cases aforesaid, B. and not A. It is, B. that is the *doer*, and that is *accountable as such;* and A. is but the accessory.

The maxim it seems to me, can have no place in criminal law, at least none except in the cases aforesaid, in which, B. is an infant under ten; an idiot, &c. In every other case, it is B. *qui facit*, not A. B. in every other case, is a free agent, and has an independent intention of his own to do the act which he does do. Accordingly, in all law, as far as I know, he ranks as the principal, not as any man's agent.

The request, then, should, I think, have been given in charge by the Court.

I doubt, whether the letter of Richter, and the conversations held in the absence of Griffin, were admissible against Griffin; but I am not prepared to say, that I think, their admission would, by itself, require the granting of a new trial.

David Harrill, plaintiff in error, vs. **H. B. Humphries**, defendant in error.

In attachment, the affidavit is sufficient, if it follow the form prescribed by the attachment Act of 1856, even although, the debt be not due.

Attachment, in Thomas Superior Court. Decision by Judge Allen, June Term, 1858.

This was an attachment sued out by Harrill, against Humphries on a note not due at the time the attachment issued, and which defendant moved to dismiss on the ground, that the affidavit made by plaintiff did not set out or state the fact that the debt was not due. The Court sustained the motion.

Counsel for plaintiff then moved to reinstate the case and to amend by inserting in the affidavit the fact that the note on which the attachment issued was not due. The Court refused the motion, on the ground, that it came too late, and that the affidavit was not amendable.

Whereupon plaintiff excepted and assigns said rulings and decisions as error.

R. S. Burch, for plaintiff in error.

McIntyre & Young, represented by Alexander, *contra*.

By the Court.—Benning J. delivering the opinion.

The affidavit followed the form prescribed by the late attachment Act; and the Act does not require more. *Acts of* 1855, 1856, *p.* 35.

It was said, that, as the debt was not due, the defendant was entitled to a stay of execution until it should become due, and therefore, that the affidavit should have disclosed the fact, that the debt was not due.

But the plaintiff's pleadings would disclose this fact; and if they would not, the defendant might bring it out in his pleadings; and, so the fact become known, the manner of its becoming known, would be immaterial; the same effect would follow, in whatever way it became known; the defendant would get his stay of execution.

We think, then, that the affidavit was sufficient. The Court below held it insufficient, and dismissed the attachment. We think, therefore, that, in this, the Court erred.

Of course it is needless to notice the other question.

Judgment reversed.

Thomas Coleman, executor, plaintiff in error, vs. Benjamin Lane, defendant in error.

[1.] After the lapse of thirty years and upwards, it is legitimate to presume that all the debts of an estate, if there were any, have been paid.

[2.] Where an estate is given for life to the widow of the testator, with remainder to seven children, by name, after the lapse of thirty years and upwards, the Courts will presume that the life estate has vested by the assent of the executor, and with it the remainder in the remainder-men; and upon the death of the tenant for life, the property does not revert to the executor, but continues in the line of direction given to it by the will.

[3.] A remainder-man has the right to sell and convey his undivided interest in a tract of land; and the purchaser under him is not entitled to the occupation of any particular portion, but is joint tenant or tenant in common with the other remainder-men of the whole; which may be partitioned by sale, and the proceeds ratably apportioned, provided the value of the entire land would be depreciated by a division.

Complaint for land, in Lowndes Superior Court. Tried before Judge Love, at June Term, 1858.

This was an action brought by Thomas Coleman, executor of the last will and testament of Isham Coleman, deceased, against Benjamin Lane, for the recovery of lot of land No. 112, in the 15th district of Lowndes county.

The plaintiff introduced in evidence, the grant from the State of Georgia to his testator, Isham Coleman, letters testamentary to him, and a certified copy of testator's will, admitted to probate on the 3d day of November, 1825, the third item of which will is as follows:

" *Third Item.* I give and bequeath unto my beloved wife, Ann Coleman, for and during her natural life or widowhood, all my estate, both real and personal; and at the death of my beloved wife, Ann Coleman, the property above willed to be equally divided between my children, seven in number: Sally, Thomas, Charles David, Washington, Isham, Jefferson and James Godwin Coleman."

The possession of defendant at the time of suit brought was admitted.

The plaintiff closed.

The defendant then offered in evidence, a deed executed by Washington Coleman, one of the devisees in remainder, conveying to him (defendant) the lot of land in controversy.

The plaintiff objected to the introduction of this deed, on the ground that it was irrelevant. The Court overruled the objection and admitted the deed, and plaintiff excepted.

The Court charged the jury, that if, from the evidence, they believed that Washington Coleman, the maker of the deed to Lane, was a legatee under the will of Isham Coleman, then his deed vested one-seventh of the land in Lane, and the plaintiff was entitled to recover only six-sevenths of the premises in dispute—the bill showing that there was seven legatees in remainder. And if they believed that Washington Coleman was a legatee, he had a right to convey his interest in the land, and his deed to the extent of this interest was valid, and vested such interest in the defendant, unless it should appear by evidence, that a sale of the land was necessary to pay debts; the date of the letters testamentary showing that Washington Coleman must have been twenty-one years old when he made his deed, To which charge plaintiff excepted.

The jury found the following verdict: "We the jury find for the plaintiff six-sevenths of the land, and one-seventh for the defendant."

The plaintiff moved for a new trial on the grounds:

1st. Because the presiding Judge erred in admitting in evidence the deed from Washington Coleman to Lane, the defendant.

2d. Because the presiding Judge erred in his charge to the jury.

3d. Because the verdict of the jury, finding one-seventh of the land in dispute for defendant, and six-sevenths for plaintiff, is contrary to evidence.

4th. Because the verdict is contrary to law.

The Court overruled the motion for a new trial, and plaintiff by his counsel excepted.

E. H. PLATT, for plaintiff in error.

JNO. R. ALEXANDER, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

John Coleman, on the 12th of December, 1817, made his will, whereby he gave and bequeathed all his estate, real and personal, with the exception of a few small pecuniary legacies, to his wife, Ann Coleman, for and during the term of her natural life; the whole of said property to be equally divided, at the death of their mother, between seven of his children therein named.

The testator having died in the meantime, this will was proven, and admitted to record in November, 1825. Thomas Coleman, one of the executors nominated in the will, was duly qualified, and in 1856, brings this action of ejectment, to recover of the tenant in possession, Benjamin Lane, lot of land No. 112, in the 15th district of Lowndes county. The plaintiff offered in evidence, a copy plot and grant from the State to his testator, his letters testamentary, together with a certificate of his appointment from the proper Court. The possession of the defendant, at the commencement of the action, having been admitted, and here closed his case.

The defendant tendered in proof, a deed from Washington Coleman, one of the seven residuary remainder-men mentioned in the will; to the introduction of which the plaintiff objected, but the testimony was allowed to go to the jury by the Court, and here the defendant rested his case.

Under the charge of the Court, and upon the foregoing proof, the jury found six-sevenths of the land for the plaintiff, and one-seventh for the defendant. Was the verdict right, and can it be executed?

[1.] It will be observed, that the will of the testator was admitted to record thirty-three years ago. We hold, that it is legitimate to presume, that the debts of the testator, if there ever were any, have long since been paid—even specialties and statutory liabilities being barred after the lapse of twenty years.

[2.] And further, we think we have a right to assume, that the executor has assented to the vesting of the life estate in Mrs. Coleman. It was his duty to do so, so soon as the debts were discharged; and even before, if this land was not needed for this purpose. Upon the vesting of the life estate in the widow, *eo instanti*, the residuary remainder vested in the seven children named in the will. Washington Coleman was one of them. He sold his interest, which was one-seventh of the lot, to Benjamin Lane. If the mother be still living, it is her business, if she see fit, and not the right of the executor, to prosecute this possessory action. If she be dead, the right, under the will, belongs exclusively to the residuary remainder-men. For, according to the decisions of this Court and, we apprehend, the well settled law upon this subject, this remainder does not revert back to the estate to be disposed of by the executor, but goes on in the line of direction given to it by the will. So, then, whether Mrs. Coleman be living or dead, the executor has no right to disturb the possession of Lane, who stands in the place of Washington Coleman, as to one-seventh of this land.

[3.] But it is complained, that the finding of the jury cannot be executed. Nothing is easier. And the misapprehension upon this point gave rise, likely, to the institution of this proceeding.

Washington Coleman could sell no particuler portion of this land. His feoffee, Lane, can hold no definite part or parcel, as against the other remainder-men. This verdict lets the executor, or rather, it should have been, the other six legatees, into the joint occupation with Lane, of the *whole* lot, and *every part* of it. Lane is entitled to one undivided seventh, and the executor, according to the verdict, to six-sevenths. There is no necessity, as counsel suppose, of effecting a sale or division. Under the Act of 1837, (*Cobb*, 583,) the land can be sold for the purpose of partitioning it, and the proceeds ratably apportioned to the several claimants, provided it shall be made appear to the Court, that the value of the entire tract would be depreciated by subdividing it. If, when the other parties are put into possession, they do not desire a sale, and they can all agree upon the joint use, very well—the finding of the jury will have been fully executed.

I would respectfully suggest, out of abundant caution, that it would be well, if the land be partitioned, to give notice to all the residuary remainder-men, or parties in interst. For it might be a serious question hereafter, whether the executor represents them, either in this litigation, or in the subsequent proceedings which may result from it. A partition, lawfully made, will cure this and all other defects.

Judgment affirmed.

Davis R. Andrews, plaintiff in error, vs. **O. P. H. Bonner** and **R. W. Bonner**, trustees, &c., defendants in error.

6th and 9th items of the will of James Bonner, deceased: "I give and bequeath to my daughter, Nancy C. Andrews, and the legitimate heirs of her body, the following property, to-wit: A woman named Polly, and her three children, viz., Mary, Susan and Ellen; also Big Mary, having given her a mare, saddle and bridle, bed, &c., heretofore."

"I appoint Oliver P. H. Bonner and Richard W. Bonner, my sons, executors on my said estate, to carry into effect this my last will and testament at my demise. I also appoint them my trustees, to carry into effect that part of this my last will and testament in regard to the negroes given to my daughter Nancy C. Bonner, formerly, now Nancy C. Andrews."

Held, That by the terms of said will, no separate estate was created in Mrs. Andrews, the daughter of the testator.

Trover, from Putnam Superior Court. Tried before Judge **Robert V. Hardeman**, at the September Term, 1858.

The facts necessary to an understanding of this case, are to be found in the opinion of the Court.

Bartlett & Foster, for the plaintiff in error.

Wingfield, for the defendants in error.

By the Court.—LUMPKIN J. delivering the opinion.

The following is the sixth item of the will of James Bonner, deceased: "I give and bequeath to my daughter, Nancy C. Bonner, now Nancy C. Andrews, and the legitimate heirs of her body, the following property, to-wit: A woman named Polly and her three children, viz., Mary, Susan and Ellen; also, Big Mary, having given her a mare, saddle and bridle, bed, &c., heretofore." The ninth clause of the testament is in these words: "I appoint Oliver H. P. Bonner and Richard W. Bonner, my sons, executors on my said estate, to carry into effect this my last will and testament at my demise. I also appoint them my trustees to carry into effect that part of this my last will and testament in regard to the negroes given to my daughter Nancy C. Bonner, formerly, now Nancy C. Andrews."

The only question for the determination of this Court is, did Mrs. Andrews, the daughter of the testator, take a separate estate in the negroes given to her and the legitimate heirs of her body, in the 6th item of her father's will?

It was said by an amiable Judge in this State, that no other Judge or lawyer of Georgia understood the doctrine of trusts, as a science, except himself. And he attributed his skill in this doctrine to having studied it thoroughly in the profound treatise of Cruise upon this subject. Now I may be permitted, I trust, without vanity, to say, that it does not require one to be versed in the learned lore of Cruise, to decide that the words of this will do not create a separate estate in Mrs. Andrews.

It is immaterial whether the estate bequeathed in the sixth item of the will be a fee or an estate tail. That it falls under the latter class, we think there can be no doubt, there being no sensible distinction between *legitimate* heirs of the body, and *lawful* heirs of the body. In either event, an absolute estate vested in the wife upon which the marital rights of the husband attached, unless the property was reserved from this result by the 9th clause of the will. And what does the appointment there made and the direction there given amount to? Why, that his executors act as *his* trustees to carry into effect that part of his will which relates to the negroes given to Mrs. Andrews. The most that can be made of both clauses taken together is, that the testator gives certain slaves to his married daughter, and appoints his two sons, her brothers, her trustees. Has it ever been held by this or any other Court, in this or any other country, that an absolute gift of property to a *femme covert*, and the appointment of trustees would create a separate estate in the *femme?* We apprehend not.

We are aware that there is no magic in the use of particular words, and that any expression which shows unequivocally the intention of the donor to exclude the rights of the husband from attaching, are sufficient. And formerly Courts were somewhat astute so to construe the language as to produce this effect. Hence Lord Aloanly held that where a fund was given in trust for a married woman, to be paid over to her own *proper* use, it would be a circumstance from which the intention to create a separate estate might be inferred. But this decision which turned upon the force of the term *proper*, was subsequently overruled. But where money or property was specifically given to trustees with instructions to pay over the interest or income to the "own use of the wife," this and no phrase of similar import merely, ever was construed to create a separate estate in the wife. And yet how much stronger is such a case than the one before us.

The testator intended, I doubt not, to create a separate property in these negroes for his daughter and her children, provided he had any intelligent purpose respecting it; but he has failed to carry that design into effect. Just as a testator dying, with but two witnesses to his will, intends, of course, to dispose of his estate, as specified in the instrument. But that intention is frustrated for want of the proper attestation. And Courts are as powerless to grant relief in the one case as the other.

If it be the will of the people to favor separate estates, which I should deeply regret to see, let their Representatives enact that whenever property is given to a female, single or married, and a trustee is appointed, that it shall be construed to mean, a separate estate. A statute of three lines will suffice for this end. Until that is done, Courts are compelled to administer the law as it is.

By way of caution, it is necessary to remark, that it will be found laid down in the books everywhere, that in all cases where fiduciary words are used, as where a gift in a will is expressed to be "for the benefit of others," &c., the terms employed are held sufficient to fasten a trust on the conscience of the donee. But the rule in all such cases applies only to contests where the question is, not whether a separate estate is created, which will exclude the rights of the husband, but whether the *donee* does or does not take in a fiduciary character? Where a gift is clearly impressed with a trust, the trustee in any event will not be entitled to the beneficial enjoyment. If he cannot hold the property for those who were intended to take by the instrument, he holds it for those who take under the disposition of the law. In this case there being nothing for the trustee to do, the trust was at once executed by the uniting of both the legal and equitable estate in the husband—if, indeed, any equitable estate ever existed.

Judgment reversed.

Lindsey H. Durham, plaintiff in error, vs. **Thomas C. Broddus**, defendant in error.

To require the granting of a new trial on the ground that the verdict is contrary to the evidence, it must clearly appear that the verdict *is* contrary to the evidence.

Assumpsit, and motion for new trial, in Jasper Superior Court. Tried before Judge **Hardeman**, April Term, 1858.

This was an action for breach of warranty of the soundness of a negro woman, Lucy, sold by Broddus to Durham. The bill of sale bears date 3d January, 1852, and contains the usual warranty of soundness of mind and body.

After the testimony had closed on both sides, a full statement of which will be found in the opinion pronounced by this Court, the presiding Judge charged the jury that if they should believe, from the evidence, that the negro Lucy was unsound at the time of the sale, they should find for the plaintiff. That the fact that the defendant may not have known of the unsoundness at the time of the sale, made no difference, if the negro was unsound at that time. That although the disease may not have developed itself at the time of the sale, yet if it existed at that period, the defendant was liable on his warranty. He was liable without fraud, if there was disease at the time of the sale.

The jury found for the defendant, and plaintiff moved for a new trial upon the following grounds:

1st. Because the verdict was contrary to the law as given in charge to the jury by the Court.

2d. Because the verdict was contrary to the evidence, and decidedly and strongly against the weight of evidence.

3d. Because the verdict was contrary to the charge of the Court.

The Court refused the motion for a new trial, and plaintiff excepted.

George T. Bartlett & **W. W. Anderson**, for plaintiff in error.

Thomas C. Broddus, *contra.*

By the Court.—**Benning**, J. delivering the opinion.

Ought the Court to have granted the motion for a new trial?

All the grounds of the motion, may be resolved into a single one—that the verdict was contrary to the evidence.

The question then is, was the verdict contrary to the evidence.

The day of the sale was the 3d of January, 1852. Was the woman unsound on that day? This is the question.

Dr. Dickerson's testimony was, that on the 22d of January, 1852, he examined her for insurance, and she told him that her "menstruation was irregular, and much too copious." That on the 26th of March, he "made a digital examination of the neck and mouth of the womb, and found them, and the whole womb, considerably enlarged." That "this examination was made during the flow of the menses, at such times the womb is generally enlarged." That "at this time he supposed, she was only laboring under excessive menstruation, for which" he "prescribed suitable remedies." That he "visited her the next day, and discharged her from" his "attentions; she in a day or two afterwards resumed her ordinary business."

That "on the 23d of September, (1852,)" he "was again called to see Lucy, made the same kind of examination, found her in the same condition, prescribed the same or similar remedies, and did not repeat his visit."

That in January, 1853, he again examined her, for insurance, but "declined to recommend her for insurance, fearing she might be more seriously diseased, than" he "had previously supposed her to be." That he "recommended her for insurance, the year previous, with a statement to the agent, that her menstruation was too copious and irregular, but" that he "did not suppose it would materially increase the risk, for that year."

That "on the 8th and 9th of March, 1853," he "visited Lucy again during a "menstrual period." That he "found her in a similar condition to what" he had "above described, but the flow more copious, and less under the control of medicine."

That "after the 9th of March," he "did not visit her again until the 17th of May following." That "from the 17th to the 28th of May," he "visited her daily, and generally, twice a day, more for the purpose of mitigating her sufferings, than with a hope of effecting a cure. During most of the time, from the 17th to the 28th of May, 1853, Dr. John P. Nelson attended Lucy with" him. That they, "in company, made an examination of the mouth and neck of the womb, with a speculum; found them considerably ulcerated, and" they "both decided the ulcer to be cancerous, and that it would very certainly, ultimately, terminate in death."

That, "as to how long she had been affected with the disease, before" he "first saw her," he could not "decide with any certainty. From the usual character of diseases of this character," he thought "it probable, the disease was in an incipient stage, on or before, the 3d day of January, 1852.

Dr. Nelson's testimony was, that Lucy must have been diseased "for a long time" before the examination of her, made by Dr. Dickerson and himself. He believed, that "her decease was hereditary." That she "must have been diseased before the 3d day of January, 1852." He said that her disease was found to be cancer of the womb.

Dr. Durham's testimony was, that the woman was brought under his treatment on the 13th of July, 1853. That he considered her disease cancer of the womb, and, incurable; that he could not "state any precise time, that she might have been diseased, but, in all probability, for some years. The inevitable result of the disease was death, which occurred on the 22d November, 1853."

Dr. Maddux's testimony was, that he knew Lucy, that she was staying at his house at the time of the sale; had known her eighteen months or two years; considered her at the time of the sale in good health Was the family physician of Broddus, (the defendant,) and never knew her sick at any time. That there is no mode of determining by examination of a patient laboring under cancer of the womb, how long the disease may have existed. The disease, generally, terminates in death, in one year; it is sometimes longer and sometimes shorter."

John C. Maddux testified, that in August, 1852, he heard plaintiff say, that he was well pleased with the two negroes.

Dr. Dickerson, in another set of interrogatories, stated, that he visited Lucy from the 17th to the 28th of May, 1853, that her "symptoms were greatly aggravated; instead of being menses and blood as they had been before, the discharge was sanious and very offensive. He also used this language: "From all I now know of the nature and history of Lucy's disease, I consider it very probable, she was afflicted with it, before the 3d day of January, 1851, but of this I am not certain by any means." The witness, it was admitted, meant to say 3d of January, 1852.

In another set of interrogatories for Dr. Nelson, he stated that he "did not attend Lucy long enough, to answer whether Lucy's disease was of the slow or rapid type." Also, that he could not "say, whether or not Lucy was diseased on or before the 3d January, 1851". It was also admitted, that he meant eighteen fifty-*two*.

This was the evidence. And we think, it such as to leave it doubtful, whether the woman had *cancer* of the womb, (the disease of which she died,) on the day of the sale. The reasons for this opinion, will present themselves, spontaneously, to an attentive reader of the evidence. It is therefore needless to state them.

Consequently, we think the case one in which the verdict ought not to be disturbed. The onus is on the losing party, to show affirmatively that the verdict is contrary to the evidence. Raising a doubt is not enough.

Judgment affirmed.

JOEL C. McDOWELL, et al., plaintiff in error, vs. WILLIAM H. PRESTON, defendant in error.

Notwithstanding, no one of the grounds separately considered, would be strong enough to entitle a party to a new trial; yet when taken altogether injustice seems to have been done, the Court will award a re-hearing.

To discredit or weaken the testimony of a witness, it is not enough to show, that the witness was in the habit of using laudanum. The proof must go further, and establish either, that the mind of the witness was impaired generally, or at least under the influence of the opiate at the time the testimony was taken.

Assumpsit, in Jasper Superior Court. Tried before Judge HARDEMAN, at April Term, 1858.

This was an action brought by William H. Preston, against Joel C. McDowell, principal, and Daniel McDowell, surety, on two promissory notes.

The defence was that the consideration of the notes sued on was, three negroes, sold by the plaintiff as guardian, at public outcry, and bought by Joel C. McDowell, and that at said sale, plaintiff falsely and fraudulently represented that one of said negroes, (Kesiah,) was sound, knowing at the time that she was unsound.

Brief of Evidence.

Plaintiff tendered and read in evidence the notes sued on, one for $648 56, the other for $486 44, dated 6th February, 1855; and both payable by 25th December next, thereafter. Here plaintiff rested.

Evidence for Defendant.

Wm. T. McDowell testified on direct examination: That he was present on the day the negroes, Mary and her children, Henry and Kesiah, were sold by plaintiff. Has heard both parties admit that the notes sued on were given for the purchase of the negroes; Mary and her child Henry, brought $705; Kesiah sold for something over $400. Whilst Kesiah was being cried, some one asked S. H. Blackwell, the crier, if the negroes were sound property. Blackwell replied, that he did not know, that the owner Mr. Preston could tell. Preston was present and called on Daniel McDowell to state whether the negro woman was sound property or not. Daniel McDowell got upon the stand and stated that the negro woman Kesiah was a sound negro; the bidding then went on, and the negro woman was knocked off to the defendant, J. C. McDowell for $400 and upwards, cannot state the exact amount.

Elizabeth Davidson examined by commission, testified as follows:

1st. I know the parties.

2d. I know negro woman Kesiah, hired said negro woman from Wm. H. Preston, Jr., the fall before she was sold, and kept her about six weeks. I paid eight dollars and a quarter for her, for the time I had her hired. I paid one dollar and a quarter to Preston, and by agreement, Miller W. Pope was to pay said Preston the remainder. Kesiah was complaining of pain in her leg, knee and hip, (right leg, I think,) all the time I had her hired, but was not confined to bed; when I would hurry her about her business, she would excuse herself on account of the pain. I informed said Preston of the condition of said negro woman and refused to hire her on account of her condition. I informed said Wm. H. Preston of the condition of said negro woman, the evening before I sent her home, which was before said Preston sold said negro woman. I did not demand a deduction for the time I had said negro woman hired, but I refused to hire her longer because I thought the price too much for a negro in her condition.

3d. I do not know who bought said negro woman at the sale, but I understood Joel C. McDowell bought her.

Cross-Examined.—1st. Yes; because I thought the price too much for a negro in her condition.

2d. I have related all that I know, that will benefit either plaintiff or defendant.

Zack Bailey testified: That he knew Kesiah; she came to his mother's the day after she was purchased by defendant; she was lame and unable to walk but little; his mother examined her in his presence; her knee (thinks the right knee,) was much swollen; she remained at his mother's until 1857; has never recovered. His mother has treated her whilst she staid at her house for the affliction; thinks the negro not worth more than two hundred dollars in her diseased condition.

A. C. Dozier testified: That he knew Kesiah; hired her for two weeks just before she was sold by plaintiff; she complained a great deal of pains in her limbs, her knees, legs, &c. Did not wish to keep her on account of her inability to work; considers her in her unsound condition, worth but little; two hundred dollars a big price for her.

Cross-Examined.—Looks like she was forty-five or fifty years old.

A. P. Baker testified: That he knew negro woman Kesiah; overseed for Daniel McDowell four years; that negro woman Kesiah complained when put to plowing; complained of pains in her legs, knees, &c., at times; had to be taken from the plow and put to the hoe, on account of her pains.

S. G. Garratt, testified: That he knew the negro woman Kesiah, that he hired her a few months before she was sold by plaintiff. That the negro woman complained all the time of pains in her knees, legs, &c.; became unable to discharge her business, *broke down entirely;* he sent her home on account of her inability to labor.

Defendant here closed, and plaintiff in rebuttal introduced the following evidence:

Dr. Wm. Dougherty testified: That he lived three or four miles from J. C. McDowell, was his family physician; had never been called in to see Kesiah, nor to prescribe for her; that he had lived at Daniel McDowell's; that Kesiah appeared well.

Cross-Examined.—Mrs. McDowell, wife of Daniel McDowell, had considerable medical skill, and gave great attention to the negro women while he lived there; when rheumatism is chronic, it is incurable, and is so considered by physicians; it becomes chronic in a year or so.

Daniel McDowell testified: That he owned Kesiah several years, say six years before she went into the possession of plaintiff, made the announcement as testified to by Wm. T. McDowell, believed it true at the time he said it, and thought at the time it was true; did not know of the afflicted condition of Kesiah.

Cross-Examined.—Mrs. McDowell was considered skillfull in the treatment of diseases in the family, and gave much attention to the treatment of diseases in the family negroes. He paid little or no attention to it.

Benajah Hardy testified: That he had known Mrs. Elizabeth Davidson to take laudanum; had carried her many bottles from town; has seen her take it sometimes. [Defendant's counsel objected to this evidence as irrelevant. The Court overruled the objection, and defendant excepted.]

Hired the negro woman Kesiah the present year for the Rev. Mr. Shipper in the latter part of January, agreed to give forty-five dollars for her.

E. B. Smith testified: That on the day of the sale of the negroes by plaintiff, and before the negroes were sold, witness was passing through the Court House, plaintiff asked witness to run the negroes for him, when they were exposed to sale. Does not recollect what price he was to run them to; plaintiff said if the negroes were knocked off on witness, that he would take the negroes at his bid. Defendant's counsel objected to the introduction of this evidence. The Court overruled the objection, and defendant excepted.

The letters of guardianship of Wm. H. Preston, were introduced; the letters bear date 2d day of October 1854.

At the close of the testimony, and after argument by counsel, the Court charged the jury, that if they should find from the evidence that the negro woman Kesiah was unsound at the time of the sale, and that Daniel McDowell represented her sound at the instance of the plaintiff Preston; he Preston knowing at the time, that the negro woman was unsound, then they should find for the defendant the amount of the difference in the price of Kesiah in her sound and unsound condition, and it was immaterial whether Daniel McDowell when he made the representations, believed them to be true or not.

The jury retired and returned a verdict in favor of the plaintiff, for the principal and interest due on said notes with cost of suit.

And the counsel for the defendant then and there moved for a new trial on the following grounds, to-wit:

1st. Because the jury found contrary to the evidence in the case, and against the weight of the evidence.

2d. Because the jury found contrary to the law of the case, and against the equity of the case.

3d. Because the Court erred in admitting the evidence of Edward B. Smith, a witness for the plaintiff, to prove the sayings of the plaintiff, made the day of the sale of the negroes, and before the negroes were sold; and because the Court erred in admitting the evidence of Benajah Hardy, that he had known Mrs. Elizabeth Davidson to take laudanum.

4th. Because the defendant, J. C. McDowell who was principal in said case, was hindered from attendance on the trial of said case by illness and indisposition, which was unknown to his counsel; the presence of said Joel C. being material and indispensable to his counsel in said case in conducting the same.

Defendant filed the following affidavit.

Georgia, Jasper county.

In open Court comes Geo. T. Bartlett, attorney at law for Joel C. McDowell and Daniel McDowell, who being duly sworn, says, that on Monday the first day of the April Term of this Court, when said case was called, deponent did not know of the illness of his client; that deponent did believe, and still believes, that the presence of said J. C. McDowell was necessary and material to aid him in the conduct of said case; and that deponent would have moved for a continuance of his said case, if he had been apprised of the condition of his said client.

April 1858.

(Signed,) GEO. T. BARTLETT.

Test; C. E. F. W. Campbell, *Clerk.*

Georgia, Jasper County.

In open Court, comes J. C. McDowell, deponent, who being duly sworn, says, that he was unable from bodily indisposition to attend the Court on Monday last; that deponent believes that his presence was necessary to aid his counsel in his defence; that deponent endeavored to procure a letter to his counsel informing him of his condition, but failed to do so, from the inclemency of the weather.

April 28, 1858.

(Signed,) JOEL C. McDOWELL.

Attested: C. E. F. W. Campbell, *Clerk.*

Plaintiff filed the following affidavit.

Georgia, Jasper County.

In open Court, comes T. C. Preston, who being duly sworn, says, that on last Tuesday night or Wednesday morning, at deponent's house, he asked J. C. McDowell, why he reckoned Wm. Malone's witnesses were not present when his case was called, that they were notified to be there, McDowell said, that he reckoned they were like he, McDowell was, that he McDowell, stayed at home believing that his case would not be called. Deponent does not know whether he, McDowell said that he was unable to come to town; does not recollect that he said it; he might have said, that he was unable to come to town; does not recollect his saying it.

(Signed,) T. C. PRESTON.

Attest; C. E. F. W. Campbel , *Clerk.*

The Court refused the motion for a new trial, and defendant excepted.

Geo. T. Bartlett, for plaintiff in error.

Anderson, *contra.*

By the Court.—Lumpkin J. delivering the opinion.

We are not prepared to say, that this is a very strong case, upon any of the grounds taken in the bill of exceptions. Still upon a review of the whole of them, we have concluded to send back this case for a re-hearing, unless the plaintiff see fit to write off $200 from the judgment, that being the amount of depreciation in the value of the negro, established by the proof.

The testimony as to the unsoundness of the woman Kesiah, at the time of the sale, and the knowledge of that fact by Mr. Preston, although somewhat conflicting, predominates in favor of the defendant. That she was laboring under rheumatism in the leg and hip, we think pretty clear. Several persons had hired her, and after keeping her a short time, sent her home, on account of her ailments. From this, it may be fairly inferred, that a knowledge of her situation was necessarily communicated to her owner. One witness, Mrs. Elizabeth Davidson, swears positively, not only as to the unsoundness, but that she informed Mr. Preston of the fact.

On the other hand, Mr. McDowell made no offer to rescind the contract. He has hired out the woman this year for forty-five dollars, a fair price, considering that she cost only $435. Still it was for a preacher, and possibly for inn-door service. The exposure consequent upon the employment of a rheumatic invalid, has much to do with the disease. It is not always, nor usually perhaps a continuous disorder, unless it has become inveterately chronic. It often, to my own knowledge, like birds of passage, appears and disappears at certain seasons; and is a complaint at all times much under the influence of the weather.

Was it right to permit the testimony of Mrs. Davidson, to be discredited or even weakened by proving that she was in the habit of taking laudanum? without going further and showing, that her mind was impaired by it, or was at least, under the influence of it at the time she testified? We think not. And this perhaps, was the main injustice which the defendant suffered during the trial. Her evidence was very material, being the only witness as we have seen, who brought home notice directly to Preston of the unsoundness of the girl.

As to the admissibility of the proof, as to what transpired between Preston and Smith, we think the Court committed no error in letting this proof in. The examination of Smith, was not pushed far enough. But that was not the fault of the Court. If his instructions by Preston to bid for him, were unlimited as to price, it is a circumstance certainly to relieve Preston from the conclusion, that the health of the slave was seriously damaged, and that he knew it. If on the other hand, his agent was restricted to a low sum, it would operate the other way. As far as it went, it was competent proof.

As to the only remaining ground taken in the motion for a new trial; that the defendant was sick, and unable to attend Court, and was prevented from conveying intelligence of that fact to his counsel, on account of the weather and high water, we forbear to express any opinion. It will not occur again in this case. Some of the Court think it sufficient as it stood; as it would have been a good showing for a continuance, could the facts have been known in advance of the trial. Other members are of the opinion, that the showing should have gone further; and that the party should have stated in his affidavit, as he would be required to do in a bill of review for a new trial, what injury he sustained by reason of his absence; as for instance, that certain objectionable persons were selected to try the cause; or that certain testimony could have been elicited, unknown to the attorney; or that testimony introduced against the party, might have been rebutted or explained, either by a more thorough examination of the party's witnesses; a more searching cross-examination of his adversarie's, or the introduction of other proof.

We leave this point here, merely adding, that in this and all such cases, the showing had better be full, as by curtailing, the application may be defeated.

Judgment reversed.

ROBERT LUNDAY and WIFE, plaintiffs in error, vs. FRANCIS THOMAS, et al., defendants in error.

[1.] When a witness is sworn by one party, in chief, the other party has, in general, the right to cross-examine him at large.

[2.] Parol evidence to show fraud in a written agreement, is admissible.

[3.] When a writing is beyond the jurisdiction of the Court, verbal evidence of its contents is admissible.

[4.] The part which the agent takes in perpetrating a fraud for the benefit of the principal, is admissible in evidence, against the principal.

[5.] If evidence is beneficial to the party excepting to it, a new trial will not be granted, even although the evidence may be illegal.

[6.] An answer in chancery, is not evidence, except as against the party who made it; as to others, it is *res inter alias acta.*

[7.] Infants are not bound by their admissions.

[8.] Guardians have no right, to make compromises that are fraudulent as against their wards.

[9.] An infant is not bound by the acts of a solicitor, who is not his solicitor; nor by a decree obtained by his consent, if the decree is tainted with fraud.

[10.] The Act of 1837, (*Cobb*, 329) does not authorize a guardian appointed in another State, to sue in this State, after both he and his ward have become residents of this State.

In Equity, in Laurens Superior Court. Tried before Judge LOVE, October Term, 1858.

This was a bill originally filed by Ann Jane Hampton, against Francis Thomas, administrator of Robert T. Coates, deceased. Subsequent to the filing of the bill, complainant intermarried with Robert Lunday, who was made a co-plaintiff.

The bill in substance alleged, that said Robert T. Coates departed this life in September, 1852, possessed of a large estate, consisting of lands, negroes, notes and money; that during his last illness he made a nuncupative will, whereby he bequeathed to complainant all the property he inherited from his grand-father, John Thomas, deceased, and the residue of his estate he bequeathed to his two half-brothers, Edward J. Coates and John G. Coates; that complainant was the maternal aunt of deceased; that said Edward J. and John G. Coates are minors, and William R. Steely their guardian, duly appointed by the proper Court.

The bill further states, that after the death of the said Robert J. Coates, complainant propounded said nuncupative will for probate in the Court of Ordinary of Laurens county, to which said Steely, as guardian aforesaid, filed a caveat; that the Court of Ordinary pronounced against said will; from which decision complainant appealed.

Pending the appeal, complainant and Steely made and entered into the following compromise and agreement, to-wit: That the negroes which deceased obtained from his grand-father, John Thomas, be divided into three equal portions or lots, one of which was to belong to complainant, one to Edward J. Coates, and one to John G. Coates; the portion set off to said minors to be delivered to their guardian. Also, that the notes and money belonging to deceased, received from his grand-father, or arising from property thus received, be divided into two equal parts; one of which was to be paid or turned over to complainant, and the other to said Steely, as guardian aforesaid.

The bill further states, that upon this agreement and compromise, a verdict was taken in the appeal case in favor of complainant, as propounder of the nuncupative will, and the same was set up and established.

The bill further states, that the defendant, Francis Thomas, was the administrator of Robert T. Coates, deceased, and had the possession of his entire estate, and that he refused to turn over and pay to complainant, the share or portion of said estate to which, under said agreement, she was entitled. And the prayer of the bill was that the defendant be compelled so to do.

Steely and the two minors, Edward J. Coates and John G. Coates, were afterwards made parties defendant to complainant's bill.

Francis Thomas, the administrator of Robert T. Coates, answered, admitting the facts as to the death of his intestate, and the proceedings in relation to the alleged nuncupative will, and that defendant had been appointed administrator, &c., but he denied that his intestate made any nuncupative will, and that the one proposed to be set up was invalid as such, not being made in pursuance of law. He also denied the validity of said agreement and compromise made between them, complainant and Steely, on the ground that Steely was not the guardian of said minors, the young Coateses, at the time.

The answer of Steely admitted the facts stated in the bill, as to the death of Robert T. Coates, and the proceedings had at the instance of complainant, to set up a nuncupative will; and pending these proceedings, complainant and himself did make and enter into a compromise and agreement, of and concerning said suit, as stated in said bill; but defendant submits that he had no authority to make any agreement or compromise in relation thereto, that would be binding on the said Edward J. and John G. Coatés, minors and sole heirs at law of deceased. That he had been appointed their guardian by the Probate Court of Marshall county, in the State of Alabama, while he resided in said State; that he afterwards removed to and became a citizen of the State of Georgia; and it was after his removal to this State, that said proceedings were had, and said agreement and compromise made; and when, as he insists, his authority and powers as guardian under the appointment in Alabama, had ceased and determined. Defendant further submits and insists, that said compromise is invalid, and not binding upon the heirs at law, upon the grounds that the same was made, in part, upon other considerations than those therein stated, and in prejudice and fraud of the rights and interests of said Edward J. and John G. Coates—one and the main reason and consideration to his entering into said compromise and agreement, being the promise made to him by Andrew Y. Hampton, the executor of John G. Coates, deceased, that if said case was settled, and said nuncupative will admitted to probate, that he, Hampton, would deliver to this defendant, the land and negroes, and other property coming to him in right of his wife, from the estate of said John G. Coates. Defendant says that said Hampton has not, however, paid or delivered to him said property; neither has Thomas, the administrator, paid or delivered to him, as guardian aforesaid, the estate of said minors, in his hands, and that thus the two main considerations for said agreement have failed.

Upon the trial complainants, amongst other evidence, introduced *William S. Rockwell, Esq.*, to prove the destruction of the original agreement set forth in the bill, and that the copy offered was a correct copy thereof. The witness was then turned over, and defendants proposed to examine him generally, touching the facts of the case.

Complainants objected to the witness stating any terms, stipulations or agreements, outside the written contract. The Court overruled the objection, and complainants excepted.

Defendants then proposed to ask the witness relative to an order written by him for Andrew Y. Hampton to sign, for the purpose of obtaining a commission from the Ordinary of Laurens county, to divide the estate of John G. Coates, deceased, and the contents thereof, it being first proved that the order was delivered to Hampton, and that he was beyond the jurisdiction of the Court. Complainants objected; the Court overruled the objection and admitted the testimony, and complainants excepted.

Defendants then proposed to show by this witness, that a fraud had been committed by complainants, through a third person, not a party to the record, but her agent, in procuring the agreement and compromise set out in complainants' bill. Complainant objected to this proof. The Court overruled the objection, and complainants excepted.

Defendants then proposed to prove by Rockwell, the result of calculations made by him, upon vouchers and returns, as to the indebtedness of John G. Coates' estate to him, as executor; the calculation itself, the vouchers or returns, were not offered. Complainants objected; the Court overruled the objection, and complainant excepted.

Complainant, in rebuttal, tendered in evidence the sworn answer of Andrew Y. Hampton, to a bill filed by Steely and wife against him, for an account and distribution of the estate of John G. Coates, deceased, and which contained his vouchers and returns of the indebtedness of said estate to Hampton, as executor, and the amounts received by him. The Court repelled this testimony, and complainants excepted.

The testimony being closed, complainants requested the Court to charge:

1st. That Courts of Ordinary in Georgia are Courts of general jurisdiction. They are clothed with original and exclusive jurisdiction, (except by appeal,) in the broadest terms, over testate and intestate estates.

2d. That the probate of a will in Georgia can be revoked only by appeal to the Superior Court; and the verdict of a special jury in such case is conclusive.

3d. That a Court of Equity has general and concurrent jurisdiction with Courts of Law, in all matters of fraud, except fraud in obtaining a will; and if the will be of personalty, then it is cognizable only in the Court of Ordinary.

4th. It is the legal consequence of the exclusive jurisdiction of the Ecclesiastical Courts, in matters relating to the validity of wills, that their decisions are conclusive of the right determined; hence, a probate of a will in said county is conclusive, both in law and equity, as to the validity of such will, so far as it embraces personalty, and it cannot be impeached for fraud.

5th. That the judgment of the Court of Ordinary, admitting a will to probate, is conclusive against all the world, and not re-examinable by any other Court.

6th. That a verdict cures all defects in pleading, and also all defects that could have been taken advantage of before verdict.

The Court refused so to charge, but told the jury that the charge above requested to be given them was law, but it did not apply to the case, as the validity of the will of Robert T. Coates was not in issue before them; that this bill was filed to enforce the agreement, and not the provisions of the will; that the provisions of the two were altogether different, and there was no necessary connection between them.

To which charge and refusal to charge complainants excepted.

Counsel for complainants requested the Court to charge, that an admission by a party is more conclusive, and to be taken stronger against him than the verdict of a jury. The Court refused so to charge, but stated to the jury that this principle of law, though correct, applied to adults, but not to infants; and complainants excepted.

Counsel for complainants requested the Court to charge, that guardians of minors had the right to compromise for their wards, where the compromise was for their interest, and a Court of Equity will enforce the same. In lieu of this, the Court charged the jury, that this principle of law was correct, but they must be satisfied from the evidence that there was no fraud, and that the compromise was manifestly for the interest of the infants; and complainants excepted.

The Court was further requested by counsel for complainants to charge, that infants in general are bound by the conduct of their solicitors, acting *bona fide* in their behalf, as well as adults; and that they were bound by a decree by consent, without reference to a master to enquire whether it was for their benefit. The Court charged the jury that these were correct principles of law, but did not apply to this case, unless they should be satisfied that the agreement was not tainted with fraud, and was manifestly for the benefit of the infants; and that they must also be satisfied that the solicitor was employed by a properly constituted guardian. To which charge and refusal complainants excepted.

Complainants' counsel requested the Court to charge, that the probate of the will could not be set aside, unless there was fraud in procuring it. This the Court refused, but charged that this did not apply to the case before them, as the validity of the will was not in question; and complainants excepted.

Complainants further requested the Court to charge, that if the will cannot be set aside, it was proper for them to enquire whether the compromise was for the benefit of the infants; and if it was, then it was their duty to enforce it. This the Court declined to charge, but told the jury that such charge would be proper if they should believe from the evidence, that there was no fraud in procuring the compromise, and it was for the benefit of the infants, but that the validity of the will was not in issue. To which charge and refusal to charge complainants excepted.

The Court was requested to charge, that a foreign guardian can sue and litigate in the Courts of this State, for his wards, and could consequently compromise said suit or suits. The Court charged, that if a guardian, residing and appointed in another State, afterwards removed to this State, his foreign letters abated, and he could not sue here as guardian. To which charge and refusal to charge complainants excepted.

The Court charged the jury that the question was, whether there was fraud in the agreement and compromise entered into by the parties thereto; and if none, whether said agreement and compromise was for the benefit of the infants, Edward J. and John T. Coates. To which charge complainants excepted.

The jury found for the defendants. Complainants moved for a new trial, upon the ground of error in all the rulings, decisions, charges and refusals to charge above excepted to, and because the verdict was contrary to law and the evidence.

The Court overruled the motion for a new trial, and complainants excepted.

Morgan, for plaintiffs in error.

Warren; and Iverson L. Harris, *contra.*

By the Court.—Benning J. delivering the opinon.

[1.] When a competent witness is called and sworn by one party, the other party will, ordinarily, and in strictness, be entitled to cross-examine him, though the party calling him does not choose to ask him a question. 1 *Green. Ev. sec.* 445.

Wm. S. Rockwell was sworn in chief by the plaintiff.

It follows that the Court below did *not* err, in permitting the defendants to cross examine him, generally.

[2.] One of the grounds of the defence, was, that the agreement on which the bill was founded, was made to defraud the two minors, Edward J. and Jno. G. Coates; and the matters in which the alleged fraud consisted, were stated in the answers. Parol evidence of fraud in an agreement, is admissible. The evidence of Rockwell, setting forth "terms, stipulations or agreements outside, and not contained in, the written contract," related to these matters of fraud. Therefore it was admissible; and the Court in admitting it, did *not* err.

[3.] When a paper is beyond the jurisdiction of the Court, verbal evidence of its contents, is admissible.

The order written by the witness, Rockwell, for A. Y. Hampton, to sign, was delivered to Hampton, and he was beyond the jurisdiction of the Court. The Court, therefore, in permitting the witness, to state the contents of the order, did *not* err.

[4.] Andrew Y. Hampton, was agent for Ann Jane Hampton, (now Mrs. Lunday,) in the part which he took in the matters in which, consisted the alleged fraud on the minors;

i. e., her agent; "in procuring the agreement to a consent-verdict before a special jury, and the withdrawal of the caveat to the will." And what one does by his agent, he does by himself. Evidence of his participation in those matters, *was* therefore admissible.

[5.] Andrew Y. Hampton was the executor of John G. Coates, deceased, the father of the two minors, Edward J. and John G. Coates, and the first husband of Mrs. Steely, wife of Wm. J. Steely, who was claiming to be, and who was acting as the guardian of the two minors. Hampton claimed that the estate of Coates owed him, as executor, a large sum.

The defendants alleged, that Wm. J. Steely, to induce Hampton to aid in the compromise of the caveat, agreed to admit his claim at $3,000, and thereupon, gave him three notes of $1,000 each; one made by him, Steely, in his own right; one made by him, as guardian of Edward; and the other made by him, as guardian of John G. Coates. And the defendants proved these allegations.

Now, if the fact really was, that the estate was indebted to Hampton, to the amount of the notes, or, even to a less amount, the case was obviously better for the plaintiffs, than it would have been, if the fact had been, that the estate was not at all indebted to Hampton.

The testimony of Wm. S. Rockwell, giving "the result of calculations he had made, upon vouchers and returns, as to the indebtedness of the estate of John G. Coates to him, as executor of said estate," went to show, that the estate *was* largely indebted to said Hampton, as such executor. The testimony, therefore, was not "against" the plaintiffs, but was beneficial to them; consequently, even if it was illegal testimony, its admission was not a ground for a new trial. The new trial Act of 1854, goes no further than to require, a new trial to be granted, when the illegal evidence is "against" the party excepting to its admission.

[6.] An answer in chancery, "is not evidence except against the party who made it, as to contradict his testimony in another cause; for with respect to others, it is *res inter alius acta*." 1 *Stark. Ev.* 184.

Therefore, the Court was right in excluding the answer of Andrew Y. Hampton, made in the cause as against him in favor of Steely and wife.

[7.] The requests numbered, 1, 2, 3, 4, 5, 6, and 7, proceed on the assumption, that the validity, of the probate of the nuncupative will, was in issue. But we, agreeing with the Court below, think, that this assumption is not true. It is not the object of the bill, to have the probate, confirmed; nor is it the object of the answers, to have the probate, set aside. It is the object of the bill, to have that *part* of the compromise carried out, which relates to the property given by the compromise, to Mrs. Lunday; and it is the object of the answers, to prevent it from being carried out; an object which they seek to accomplish, not by attacking the *probate*, but by attacking the *compromise* itself, for fraud. Therefore, even if the object of the answers be attained, the other part of the compromise, that by which, the will was admitted to probate, will remain unaffected; and consequently, the probate itself will stand good, until got rid of by some new proceeding.

We think, therefore, that the Court was right in refusing to give these seven requests in charge.

[8.] It is, in general, true, that infants are not bound by their admissions. Therefore, the Court's qualification of the eighth request, we think, was a proper qualification.

[9.] If guardians have the right to make compromises for their wards, it is certainly true, that they have not the right to do so, fraudulently.

Therefore, we think that the Court's qualification of the ninth request, was a proper qualification.

[10.] The bill of exceptions, states the next two requests, and the disposition made of them, as follows:

"The Court was requested to charge the jury:"

"1st. In general, infants, as well as adults, are bound by the conduct of their solicitors acting, *bona fide*, in their behalf."

"2d. Infants are bound by a decree taken by consent, although no reference to a Master to enquire, whether it was for their benefit."

"The Court told the jury, that these were correct principles of law, but did not apply to this case, unless the jury should be satisfied, that the agreement was not tainted with fraud; was manifestly for the benefit of the minors; and, also, that they must be satisfied, that the solicitor was employed by a properly constituted guardian."

Surely it must be true, that an infant is not bound by the act of a solicitor, who is not his solicitor. And it must be equally true, that a decree obtained by the consent of infants, does not bind them, if the decree is tainted with fraud.

The questions on the next two requests, have been disposed of, in the disposition made of previous requests.

The last request and the disposition made of it, are stated as follows:

"The Court was requested to charge the jury, that a foreign guardian can sue and litigate in this State, for his wards, and has the consequent right and power, to compromise any suit which may be pending."

"The Court told the jury, that this was correct as a geneal principle, but did not apply to this case, if the guardian, Steely, had removed from Alabama to this State, at the time —for his letters obtained in Alabama, abated upon his removal to Georgia."

The "time" here meant, was the time when Steely appeared in the Court of Ordinary, and entered the caveat, as guardian of the two minors.

It is only by statute, that a guardian appointed in another State, can sue at all in this. And the statute goes no further, than to authorize such guardian to sue, if both he and the ward reside out of the State, at the time when he sues. *Cobb*, 329.

We think, that the qualification annexed to the request by the Court, was substantially correct.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATHENS,
NOVEMBER TERM, 1858.

Present—JOSEPH H. LUMPKIN,
CHARLES. J. McDONALD, } Judges.
HENRY L. BENNING,

Everett Yerby, administrator, plaintiff in error, vs. J. R. & L. C. **Matthews**, defendants in error.

A debt was not made known to the executor, until after the expiration of the twelve months within which, the law requires debts to be made known to an executor, and after he had distributed all the assets, except the share of one legatee.

Held, That he was nevertheless bound to apply this whole share, first to the debt.

Certiorari, in Clark Superior Court. Decision by Judge Hutchins, August Term, 1858.

This case was brought up to this Court, upon the following agreed statement of facts, viz:

Everett Yerby, administrator with the will annexed, of James Rhodes, deceased, gave due and legal notice to the creditors of deceased, to present their demands agreeably to law. J. R. & L. C. Matthews held a note against deceased, of which they failed and neglected to give the administrator notice, within the twelve months as required by law, and did not present the same for payment until after he had paid out to the legatees all the estate in his hands, except the share of one legatee residing in the State of Alabama; there were eight legatees.

The Justice's Court, in which suit was brought on the note, gave judgment for the defendant, and the case being brought by exception and certiorari to the Superior Court, Judge Hutchins, presiding, sustained the certiorari, and set aside the judgment of the Justice, holding that the administrator having assets, plaintiffs were entitled to a judgment, not only for one-eighth of their claim, but for the whole.

To which decision defendant excepted, and assigns the same as error.

W. L. **Mitchell**, for plaintiff in error.

W. G. **Delony**, *contra.*

By the Court.—**Benning** J. delivering the opinion.

The common law made an executor or administrator, personally liable, if he distributed the assets to the legatees, or to the next of kin, before he had paid the debts of the testator, or of the intestate.

Our statute of 1792, says, that "every executor or administrator shall give six weeks notice by advertisement in one of the public gazettes of this State, or at three different places of the most public resort in the county, for creditors to render an account of their demands; and they shall be allowed twelve months to ascertain the debts due to and from the deceased, to be computed from the probate of the will or granting letters of administration. And creditors neglecting to give in a state of their debts within the time aforesaid, the executors or administrators shall not be liable to make good the same." *Pr. Dig.* 229.

The meaning of this last part of these words is, that the executor or administrator shall not be *personally* "liable," &c.; not, that he shall not be *officially* liable; not that he shall not be "liable," if he has assets still remaining in his hands.

This is a meaning consistent with the words; one which they have ever received in practice, so far as we know or believe; and one which is required by statutes in *pari materia.* See refunding-bond Act of 1812. *Pr. Dig.* 241.

If then the executor or administrator is notified of debts, whilst any assets remain in his hands, he is, notwithstanding these words of the Act of 1792, still bound rather to apply such assets to those debts, than to distribute the assets to legatees or heirs; and he is so bound, even although the notification of the debts, may, have been made to him, not until after the expiration of the twelve months.

The decision of the Court below, was in accordance with these views. It was, that the executor having one-eighth part of the assets in his hands still undistributed, (that is, the share of one of the eight legatees,) he was bound to apply the part, to the payment of this debt.

We think, therefore, that the decision was right.

Judgment affirmed.

ABNER M. KELLY, plaintiff in error, vs. W. ELIZA TERRELL, adm'x, defendant in error.

An agreement made before Christmas in 1854, to perform services as overseer for the year 1855, not being in writing and no memorandum thereof in writing signed by the party sought to be charged, is void under the statute of frauds, not being an agreement to be performed within the space of a year from the time of the making thereof.

Assumpsit, in Hancock Superior Court. Tried before Judge THOMAS, Fall Term, 1858.

The facts of this case are stated in the opinion of the Court.

POTTLE, for plaintiff in error.

STEPHENS & DUBOSE, *contra.*

By the Court.—McDONALD J. delivering the opinion.

The defendant pleaded the statute of frauds, that the agreement upon which the action was brought was not to be performed within the space of a year from the making thereof, and that it was not in writing. The plea is not in precise form, but it is substantially correct. It was not excepted to, and had it been, it might have been amended in the Court below. On the trial, no writing was produced, but a witness testified that four or five days before Christmas, 1854, he had a conversation with the defendant's intestate, who told him that he had employed plaintiff as his overseer for 1855. Afterwards, on the first Monday in January, said intestate informed him that he had discharged the plaintiff from his contract of serving him in 1855, and assigned as a reason, that he had written a letter to the plaintiff about his cotton, and he had not noticed it. The Court charged the jury that if they believed from the evidence, that the contract was made, and the plaintiff discharged before the first day of January, 1855, they ought to find for the defendant, unless it appeared from the evidence that the contract was in writing. To this charge of the Court, the complainant's counsel excepted. There is no other assignment of error in the record.

The statute of frauds is explicit on the subject of such contracts. It declares that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year, from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. *Cobb's new Dig.* 1,127. The contract was made before Christmas, 1854; for, four or five days before that time, the defendant's intestate spoke of it to the witness, and it was for services for the year 1855. The contract was not to be performed within the space of a year from the time of the making thereof; and there was no writing or memorandum thereof signed by the party to be charged therewith. No action, therefore, can be brought upon it. A case very much like this, has been determined in the Court of Exchequer in England. *Snelling vs. Lord Huntingfield*, 1 *Craig. Mee. & Res. Reports* 20. If this had been a suit for services already rendered it would have been different.

Judgment affirmed.

Thomas Wynn, plaintiff in error, vs. Efford Booker, et al. defendants in error.

Joint executors are "joint contractors," as it concerns contracts of their testator; and therefore, service on a part of them and a return of, not to be found, as to the other part, is sufficient, in an action against them.

Complaint, in Wilkes Superior Court. Decision by Judge Thomas, at September Term, 1858.

This was an action of complaint on open account, brought by Thomas Wynn against Efford Booker, Simpson Booker and Leroy Booker, executors of Richardson Booker, deceased. The account created by the testator. The declaration and process were served on Efford Booker and Simpson, and an entry of not to be found, was made as to Leroy Booker.

Upon the cause being called, counsel for defendants, moved to dismiss the action, on the ground that Leroy Booker, one of the defendants, had not been served with copy writ and process.

The Court granted the motion, and counsel for plaintiff excepted.

Counsel for defendant, then by leave of the Court, amended his declaration and process, by striking out the name of said Leroy Booker.

Whereupon, counsel for defendants pleaded in abatement the nonjoinder of said Leroy Booker, who was at the commencement of this suit a co-executor, &c.

The Court sustained the plea, and dismissed plaintiffs action, and counsel for plaintiff excepted.

Andrews & Andrews, for plaintiff in error.

Thomas & Reese, *contra.*

By the Court.—**Benning**, J. delivering the opinion.

The action was founded on an account, i. e. a debt, contracted by the testator in his lifetime. In reference to the account or debt, then, the *testator* was a *contractor.*

The three executors represented the testator, in reference to the account or debts; and an action *ex contractu*, as, assumpsit or debt, lay against them jointly for it. Therefore, they too were, in law, *contractors* in reference to its joint contractors. Indeed, it is not clear, but that the oath which they took, made them joint contractors *in fact*, as well as in law. They swore, that they would pay "first the debts and then the legacies." *Pr. Dig.* 227.

But if the executors were joint contractors, the case was one falling within the Act of 1820, which declares, "that wherever two or more joint contractors or copartners, are sued in the same action, and a service shall be effected on one or more" of them, "and the Sheriff" "shall return, that the other defendant or defendants are not to be found, it shall and may be lawful, for the plaintiff to proceed to judgment and execution against" those served. *Pr. Dig.* 445. We think the case one falling within this act.

And all was done that the Act required to be done. Two of the executors were served; and a return of, not to be found, was made as to the third, by the Sheriff.

Therefore, we think, that the Court below erred in sustaining the motion to dismiss the action.

This makes it unnecessary to consider the other exceptions.

Judgment reversed

Alvin M. Robertson, plaintiff in error, vs. Samuel Glenn, defendant in error.

A security who receives a note from his principal or a third person to be transferred to the creditor to whom he is bound, but who does not do it, but sues on the note himself, is not such a holder for value in the course of trade as to exclude a defence by that third person, which he might have set up against the payee; and that he held a conversation which the maker who agreed to give security on the note, does not estop him (the maker,) from setting up the defence.

Assumpsit, in Oglethorpe Superior Court. Tried before Judge Thomas, at April Term, 1858.

This was an action brought by Samuel Glenn, (bearer,) against Alvin M. Robertson, on a promissory note of which the following is a copy, to-wit:

$852 52-100. AUGUSTA, August 12th, 1853.

One day after date, I promise to pay to E. D. Robertson, or bearer, eight hundred and fifty-two 52-100 dollars, for value received.

(Signed,) ALVIN M. ROBERTSON.

The plaintiff introduced the note, and closed.

The following agreed statement of facts was submitted by the defendant:

E. D. Robertson owed Governor Gilmer a sum of money, for the payment of which Samuel Glenn was his security. Alvin Robertson some time prior to August, 1853, left his signature or blank note with E. D. Robertson. This blank note or signature was filled up and made the note sued on bearing date 12th August, 1855, payable one day after date, for $852 52-100, to E. D. Robertson or bearer. On the 31st August, 1853, E. D. Robertson enclosed this note to Samuel Glenn, saying that he presumed Governor Gilmer would take it, as it would be paid when his brother sold his crop. In the same letter, he stated that he had not quite as much funds in his hand as he wished to send checks for, and directed him to hold the note until he sent the check, which would be soon, and he would then have but one trouble to settle the matter. On the 2d day of September afterwards, he wrote Alvin M. Robertson, in which he said, as he was owing Governor Gilmer some money, and wished to pay him, he had filled up a blank note for the amount he was owing Robertson & Crocker, which is $852 52-100, and had sent it to Dr. Glenn for the purpose of handing it to Gilmer in part payment of what he was owing him. He said he presumed that Mr. Gilmer would give him all the indulgence he wanted, and hoped it would be satisfactory to all parties concerned; shortly after these letters were received, the plaintiff and defendant met in Lexington, and plaintiff, Dr. Glenn, told the defendant, A. M. Robertson, he must give security on the note or else Governor Gilmer would not accept it, and if he would secure the note, it would answer him as cash, he being security on the note held by Governor Gilmer on E. D. Robertson. A day was appointed for A. M. Robertson to give security, but the parties did not meet, and the security was not given. The note was never offered to Governor Gilmer.

In the month of October, 1853, and a few months afterwards, A. M. Robertson sent to E. R. Robertson & Stovall thirty-two or thirty-three bales of cotton, on which he drew $400 leaving in their hands $800 or $1,000. Robertson of this firm absconded in August or September, 1854, leaving his firm largely in default, and not having accounted with A. M. Robertson for his cotton, except the $400. Samuel Glenn paid the note to Governor Gilmer on which he was security for E. D. Robertson, and instituted this suit on the note of $852 52-100 to October Term, of Oglethorpe Superior Court.

A. M. Robertson has sued Stovall for the amount due for the cotton.

In the Spring of 1853, A. M. Robertson, handed George F. Platt $400, which he carried to Augusta, and paid to Robertson & Crocker for A. M. Robertson.

The account of Robertson & Crocker was offered in evidence, showing no credit for the $400 paid by Platt.

The evidence having closed, the plaintiff's counsel argued to the jury, that the plaintiff's counsel was estopped by the conversation with Dr. Glenn, from setting up the mistake in the note, by reason of the credit of $400 proven by Platt, not being given in the account; whereupon, the counsel for the defendant requested the Court to charge the jury that the principle of law which estopped a party from denying a statement upon which another acted, did not apply to this case; because there was no pretence of deceit or of injury resulting from any action of the party subsequent to or consequent on the conversation.

The defendant requested the Court to charge the jury, that the principle of law which estopped a party from denying a statement upon which another had acted, did not apply to this case, because there was no pretence of deceit, or of injury resulting from any action of the party subsequent to, or consequent on the conversation: which charge the Court declined to give, and defendant excepted.

The Court charged the jury, that the defendant was estopped from setting up any defence against the note sued on in the hands of plaintiff, which he may have when said note was in the hands of E. D. Robertson, after having promised plaintiff to give security on said note, after it came into his (Glenn's) hands.

To which charge defendant excepted.

The jury found for the plaintiff the full amount of the note with interest and cost.

Defendant moved for a new trial on the ground, that the Court erred in charging and refusing to charge the jury, as above stated.

The presiding Judge overruled the motion for a new trial, and defendant excepted.

T. R. R. COBB & W. G. DELONEY, for plaintiff in error.

L. STEPHENS, *contra.*

By the Court.—McDONALD J. delivering the opinion.

The note sued on was sent to the plaintiff in the Court below for the purpose of being offered to Governor Gilmer, in part payment of a debt due to him by E. D. Robertson, the payee, and on which the plaintiff was his surety. The consideration of the note was a balance claimed to be due by the maker to the firm of Robertson & Crocker. The defendant sets up as a defence, a mistake of $400 in the balance against him, by a failure to pass to his credit on the books of that firm, the sum aforesaid, which had been sent them by George F. Platt, and by him paid to them on account of defendant. The plaintiff was of opinion that Governor Gilmer would not receive the note without security, and he so told the defendant, and a time was appointed to give the security. But for some unexplained cause the parties did not meet at the appointed time.

We cannot perceive how the conversation between these parties can affect the interest of the defendant in this Court. The plaintiff in error said nothing to mislead him, by which he sustained any loss. He gave up no security in consequence, nor did he assume any greater responsibility. He was, in fact, acting as agent for Robertson, and but for the direction in Robertson's letter to him, to delay presenting the note to Governor Gilmer until he sent him a check, it would have been his duty to offer the note to him, and if he had refused to receive it, to have returned it to Robertson with that information. It is virtually the note of Robertson now, and any mistake in the amount for which Robertson filled the blank, or wrote the note over the signature may be corrected. The plaintiff no doubt conceived himself authorized, after E. D. Robertson absconded, to retain the note as collateral security; but if he was entitled to it as collateral security only, that gave him no right to exclude a defence by the maker, which he might set up against Robertson. He assumed Robertson's position in all respects. This is my opinion.

We think that the request in writing made of the Court by counsel of defendant ought to have been given in charge to the jury.

Judgment reversed.

ISAAC S. WHITTEN, plaintiff in error, *vs.* JAMES B. KNOX, defendant in error.

Where the only question in the case is, whether or not the verdict be contrary to the proof, it requires a strong case to authorize the Court to set aside the finding of the jury and order a new trial.

Assumpsit, in Hancock Superior Court. Tried before Judge JAMES THOMAS, ——— Term, 1858.

This was an action of assumpsit brought by James B. Knox against Isaac S. Whitten, upon the following written contract, viz:

A contract between I. S. Whitten and James B. Knox, witnesseth that said Knox agrees to put in a new pier-head and gate at the upper end of Whitten's mill race, where there is now one, to raise the mill-dam ten inches higher than the old dam, so as to raise and to hold the water that much higher than the present one. The framing to be all of oak, the plank of pine. Whitten to furnish the plank and nails, and to haul suitable oak stocks to the mill and allow Knox to saw his scantling and frame works in his saw mill at a time when it will not interfere with the grinding. Knox is to do the work as early this spring or summer, after the weather gets warm, as Whitten may direct. To make a substantial, durable job of the pier-head, dam, and the spiling around the abutments, and warrant the whole not to leak or give way in any way from the force of freshets, &c., and not to stop Whitten's grist mill more than one week. Whitten to board the hands while they are at work on it, and to pay Knox one hundred and twenty-five dollars at the end of the year, if well done. The contract to be understood as to make allowance for providential and unavoidable accidents in detention.

March 16th, 1855.

[Signed] JAMES B. KNOX,
I. S. WHITTEN.

Evidence for Plaintiff.

George I. Read, (for plaintiff,) testified that he resided in Greene county, and is a mill-wright by trade; thinks the contract between plaintiff and defendant was made in April, 1855, and that said contract was, that defendant was to pay plaintiff one hundred and twenty-five dollars (he thinks) for raising his mill dam ten inches higher, and for spiling the butments, and making a new pier-head; and plaintiff was to warrant his work to stand, and not to leak; but did not warrant the old dam. Witness did not see the work until the dam was washed away; the pier-head was standing alone, and was done in a workmanlike manner. The raising the dam and spiling was worth about seventy-five dollars; the work on the butments and the building of the pier-head was worth fifty dollars. The part plaintiff built alone was warranted.

John Drake, sworn for plaintiff. Never saw the work while in progress; was at the dam after it had broke. In August of that year there was the largest freshet that had been in the creek for near forty years; could not state positively whether it was the largest freshet which carried away the dam or not; there remained, after the freshet, the pier-head; the butments and one third of the dam were gone; the way sheeting is put on a dam would not make the rock work of the dam give way. Plaintiff closed.

For Defendant.

Defendant offered deposition of *James Whitten:* About 6th January, (1857,) was at the house of defendant in Hancock county, when plaintiff came there, as he stated, to have a settlement with defendant for work done on defendant's dam; they had a conversation about the matter, in which conversation defendant stated to plaintiff, that he, plaintiff, had warranted the work to answer defendant's purpose, and that it had failed to do so; which was admitted by plaintiff. In the conversation allusion was made to some previous conversation had between them while the work was in progress, in which it was stated by defendant and admitted by plaintiff, that defendant had complained to plaintiff, that the way plaintiff was doing the work, it would not stand, and requested plaintiff to change the manner of doing the work. The plaintiff refused to do the work in the manner the defendant requested him, and seeing that plaintiff refused to do the work as defendant requested, the defendant proposed that if plaintiff would stop the work, he would pay all the expenses up to that time, which witness understood to mean the wages of the workmen employed by plaintiff in doing the work. It was admitted by both parties that soon after the work was done (which work I understood to be mostly the top work done on an old dam, a freshet came and took away both the old dam and the new work of the dam. By which the defendant said he had been damaged five hundred dollars. In this conversation both parties agreed that at a previous time they had agreed to refer the whole matter to the arbitrament of a Mr. Reed, who had died without making a settlement between them. Elrya Whitten and some members of the family (defendant's) were present a part of the time during the conversation; on plaintiff's leaving defendant's house, he said he should sue defendant.

Defendant then offered *James Cobb*, who testified that he was the overseer of defendant when the work was done; during the progress of the work, he heard defendant complain of the work; he complained of the sheeting. Witness told plaintiff what defendant said, and said (to plaintiff). If I were in your place I would do the work as defendant wished it done. Plaintiff replied to witness, that he would do the work as defendant wished. Plaintiff did not change the mode or plan of the work, but finished it as he had commenced; the length or width of the sheeting on the old dam was about fourteen feet; the rafters or girders which were put on the old sheeting for the purpose of raising the dam higher, were about half way down. The dam was raised, but witness couldn't say whether or not it was raised ten inches; never heard defendant express any dissatisfaction to plaintiff about the work while it was in progress; witness was frequently about the dam while it was in progress, helping; dam was broken in August, 1855, but does not know whether or not that was the biggest freshet of that year. Witness and defendant's negroes were working on the end of the dam at the time it broke, and one of the negroes called attention of witness to the dam; he turned around and saw the rock part and wooden part of the dam tumbling both over at once.

James Parks, for defendant, said that in the early part of 1857, perhaps January, he came to Dr. Whitten's to live; since that time he has frequently seen the pier-head and butments of the dam, portions of the plank used in the construction were rotten; there were cracks or openings between the planks, which caused them to leak very badly; that at one place in the pier-head or between the pier-head and butments, such an opening or rent had been gained by the water as to create a waste of water; had been sent there by Dr. Whitten to examine and stop it, which he did; this was in the summer of 1857; witness is no workman; was staying at Dr. Whitten's going to school.

The jury found for the plaintiff. Defendant moved for a new trial, which the Court refused, whereupon defendant excepted.

E. H. Pottle, for plaintiff in error.

L. Stephens, *contra.*

By the Court.—Lumpkin, J. delivering the opinion.

The only question submitted to us is, whether or not the verdict in this case is contrary to evidence.

After carefully scrutinizing the testimony, we are not prepared to say that the finding is contrary to the proof; certainly it cannot be affirmed of it that it is strongly and decidedly against the weight of evidence.

When a transaction like this is fairly left to the jury, and it is not denied but that this was the conclusion to which they came, it should not be disturbed unless upon clear grounds, indicating mistake or something worse. Nothing of this sort can be properly attributable to the result here. The jury were warranted in believing that the work on the defendant's mill was performed according to contract, and that the failure was occasioned by the deficiency in the old rock work of the dam, and for which the plaintiff was not responsible.

Judgment affirmed.

ROMULUS G. BEALL, plaintiff in error, vs. JOHN T. BERKHALTER, defendant in error.

Whether a covenant of warranty is to be so construed relatively to the quantity of land conveyed, as to be deemed an assurance to the purchaser of the existence of that quantity, will, in many cases, depend upon the manner in which the particular deed is expressed.

Unless where the enumeration of the quantity is of the essence of the contract, and not matter of description merely, the covenant of warranty will not be broken by a deficiency in the quantity of land conveyed.

Debt, in Warren Superior Court. Tried before Judge THOMAS at October Term, 1858.

This was an action of debt brought by John L. Berkhalter against Romulus G. Beall on a note, of which the following is a copy, to-wit:

"On or before the twenty-fifth day of December, eighteen hundred and fifty-one, I promise to pay John L. Berkhalter, or bearer, one thousand dollars for value received this October 30th, 1850.

[Signed] ROMULUS G. BEALL."

The defendant pleaded partial failure of consideration in this: that plaintiff sold him eight hundred and sixty acres of land, and that the note sued on was for part of the purchase money of said land, and that upon re-survey, said land turned out to be only seven hundred and fifty acres; and for this deficiency in quantity, claimed a deduction or abatement from the note sued on. And in support of this defence, defendant offered in evidence the deed from plaintiff conveying said land This deed "witnesseth that the said John L. Berkhalter, for and in consideration of the sum of four thousand dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and doth by these presents grant, bargain, sell and convey unto the said Romulus G. Beall, his heirs and assigns, all that tract or parcel of land situate and lying in the county of Warren, on the waters of Carson's and Hart's creeks, *containing eight hundred and sixty acres, more or less*, adjoining land of Hudson and Palmer on the north and ———, and Fuller on the north-east, Mrs. Linely on the east, Mrs. Lewis on the south, Mrs. Dozier and Henry Hight on the west. To have and to hold said tract of land unto him, the said Romulus G. Beall, his heirs and assigns, together with all and singular the rights, members and appurtenances thereof, to the same in any manner belonging, to his and their own proper use, benefit and behoof forever in fee simple. And the said John L. Berkhalter, for himself, his heirs, executors and administrators, the said bargained premises, unto the said Romulus G. Beall, his heirs and assigns, will warrant and forever defend the rights and title thereof against themselves and against the claims of all other persons whatsoever. In witness," &c.

The plaintiff objected to the introduction of this deed on the ground that said deed contained no warranty of quantity or number of acres.

The Court sustained the objection and repelled the deed, and to this ruling or decision defendant excepted.

The jury found for the plaintiff the full amount of the note.

Whereupon defendant tenders his bill of exceptions, and assigns as error the decision above excepted to.

ED. H. POTTLE, for plaintiff in error.

L. STEPHENS & L. A. NELMS, representing A. STEPHENS & GIBSON, *contra.*

By the Court.—LUMPKIN, J. delivering the opinion.

Was the Court right in rejecting the deed from Berkhalter to Beall, which was offered by the latter to support his plea of partial failure of consideration in this case?

The answer to this question will depend upon the further enquiry of whether the enumeration of the quantity of acres is of the essence of the contract between these parties,or is matter of description merely. If the former, then, the covenant of warranty must be construed relatively to the quantity of land conveyed, and is to be deemed an assurance to the purchaser of the existence of that quantity. If otherwise, the covenant of warranty will not be broken by a deficiency in the quantity of land conveyed. Berkhalter sold to Beall "all that tract or parcel of land situated and lying in the county of Warren, on the waters of Carson's and Hart's creek, containing eight hundred and sixty acres *more or less,* adjoining the lands of Hudson and Palmer on the north and ———, and Fuller on the north-east, Mrs. Linely on the east, Mrs. Lewis on the south, and Mrs. Dozier and Henry Hight on the west," &c.

When the words more or less are annexed to the quantity of land, it is against principle that the vendor should be responsible to assure any given number of acres unless he practiced fraud upon the purchaser. These words should have been held to be used, as they no doubt were originally, to protect him against any such disability; it would have saved an incalculable amount of litigation, as every rule which is fixed and certain does. But it is too late, perhaps, to establish such a doctrine in the face of such an amount of judicial interpretation, to the contrary. The decisions are, that these words are intended only to protect the seller against a small deficiency where there is an approximation to the quantity of acres mentioned. Suppose this case came within the class which the defendant contends it does. What deficiency would be covered by the words more or less? It is assumed, with great confidence, that one hundred and ten acres would constitute too great a disparity. What then is allowable in a tract of eight hundred and sixty acres? I propound these queries to expose the unsatisfactoriness of the rule. It is substituting the Court and jury in each particular case, to bind the vendor according to their discretion.

But that is not all. There is no reciprocity in the rule. It don't work both ways. If the quantity of acres exceed the number specified ever so much, it is not pretended that the purchaser is subject to reclamation. In other words, less don't mean *less*, but more does mean *more!*

But how stands this deed? Was the quantity of acres here of the essence of the contract, or were they inserted as descriptive merely? The presiding Judge held the latter, and rejected the deed; and we think properly. The land was sold as a tract in bulk, and is described as lying on two water courses in Warren county; and all the coterminus proprietors are designated, and it is conjectured to contain eight hundred acres; still, it may be more or it may be less. Neither seller nor buyer knew certainly the size of the tract. They both "*guessed,*" probably, that there were about eight hundred and sixty acres. It does not appear, as in the Virginia case, that the vendor was informed by the previous conveyance to him that there was less land than that. In the case in Munford, the prior deeds called only for seven hundred and ninety-five acres, and the vendor conveyed one thousand. There is no pretence of fraud in this case. Neither the suppression of truth or the suggestion of falsehood knowingly. No intentional misrepresentation of any sort. In such a case, relief would be granted.

Judgment affirmed.

WILEY, BANKS & Co., plaintiffs in error, vs. ALLEN & STANFORD, defendants in error.

If one partner take the *money* of the firm, and apply it to the discharge of his separate debt, without the assent or knowledge of the other member, it cannot be recovered back, unless the separate creditor knew, or had reason to believe, that at the time of the payment it was partnership money.

Complaint, in Habersham Superior Court. Tried before Judge HUTCHINS, at October Term, 1858.

This was an action by Wiley, Banks & Co., merchants of Charleston, South Carolina, against Allen & Stanford, late merchants doing business in Lawrenceville, Ga., on their promissory notes—one for $1,443 11, one for $979 28, and one $429 17.

The plaintiffs offered in evidence the notes sued on, and closed.

The defendant then introduced the interrogatories of *Nathan L. Hutchins,* the presiding Judge, which, by agreement of parties, were read; the answers to which are as follows:

"On or about the 14th June, 1851, I took a note made by Thompson Allen, and Kenan T. Terrell and Hamilton Garmany, securities, for the sum of $2,349 70, payable to plaintiffs, at 12 months. This note was paid by Thompson Allen, as follows:

He paid me on the 18th January, 1852, $500; on 24th May, 1853, $300; he paid to plaintiffs, as I learned from both parties, on the 2d February, 1854, $1,000; he paid to ——— ——— on the 23d March, 1855, $753 65; and on the 29th October, 1855, the balance in full, $84 00. He does not know, nor has he any information or belief, that the money was paid out of the funds of Allen & Stanford, and does not know where Allen obtained it. I know that Allen was much indebted; he had considerable property about him; a few slaves, a town lot, and merchandise, the value of which I cannot tell; I never considered him worth much; I believe, from the quantity of unpaid debts, and the manner of closing the concern, that the partnership firm of Allen & Stanford wound up insolvent for a considerable sum; for how much, I cannot tell; I know that there are divers unpaid judgments against it."

The defendants then introduced the interrogatories of *James D. Spence,* the answers to which are as follows:

"I know Allen & Stanford; commenced clerking for the firm of Allen & Stanford 25th day of April, 1853, and left them 28th May, 1855; the firm consisting of Thompson Allen and John R. Stanford, and the business was conducted in Lawrenceville, Gwinnett county, by Thompson Allen; John R. Stanford was at their place of business about the last days of May, 1855, and stayed three or four days. He has passed through their place of business at other intervals, but did not make but short stays, nor attend to any business of the firm only on the first visit, that I recollect. Thompson

Allen did take out money from the firm, at divers times, for his private use, but the amounts I cannot recollect, at each time. The defendant, John R. Stanford, was never present at any time that I know of, when the money was taken; I do not believe said Stanford had any knowledge of the fact, or would have assented to it. I do not know, of my own knowledge, that Nathan L. Hutchins had any papers against said Thompson Allen. I counted out eight hundred and forty dollars out of the funds of Allen & Stanford, and delivered to said Allen, at his request; he took it and left with it for Col. Hutchins' office; it was during our Superior Court, March Term, 1855; it was in the absence of Stanford, or without his knowledge or consent, so far as I believe. I believe that the firm of Allen & Stanford kept correct books, and the above $840 is on the books of original entries of the firm, for cash."

Defendant then offered the interrogatories of *Thompson Allen*, to which plaintiffs objected, on the ground that said Allen was an incompetent witness, interested in the event of the suit. The Court overruled the objection and admitted the testimony, to which decision the said plaintiffs, by their attorneys, excepted, and now assign the same as error. The answers of said Allen were then read to the jury, as follows:

"John R. Stanford and Thompson Allen composed the the firm of Allen & Stanford, and transacted business in Lawrenceville, Georgia; business was in the year 1853, month not recollected, and closed 18th September, 1856. I was indebted to plaintiffs before and at the commencement of the business of Allen & Stanford; plaintiffs held my note for over two thousand dollars, precise sum and date not recollected; no one was securities to the first notes, but afterwards, I reduced the indebtedness to twelve or fourteen hundred dollars, and gave a new note for said sum, payable 12 months after date, and giving Capt. Hamilton Garmany and Kenan T. Terrell as securities. I paid off the note, or most of it, in March, 1856, to Nathan L. Hutchins, Esq., attorney for plaintiffs; afterwards paid the remainder of it to said attorney, date not recollected; the money paid by me belonged to Allen & Stanford, and at the time the payment was made, the business was under my sole control; Mr. Stanford living in Clarksville, was not there, and did not consent or know any thing about it. I can form no estimate of the difference between the assets and liabilities of said firm; I cannot say whether it was insolvent to a larger or smaller amount, as I have had no control of the business since 18th September, 1856; the business since that time, was nominally in the hands of receivers, but under the control of Mr. Stanford. The capital was the amount of goods I had on hand, and the credit his name gave the firm, and the goods subsequently purchased on credit by the firm; there was no cash furnished; I do not know the amount of the profits, nor the debts, good or bad, but perhaps the books will show. Perhaps, at the commencement of the business, I was insolvent, but it was not known to me or the public; at this time, I am, without a doubt."

Cross Examined.—"Our books show the cash transaction, and how it was disposed of, and were at all times accessible to Mr. Stanford, when in Lawrenceville. I was in the habit of using what money I saw proper, from the commencement of the business, and heard no objection from Mr. Stanford, until the early part of the year 1856; then he complained that my cash account was too large; and after that, frequently made the same complaint. To the best of recollection he was, on an average, at least once a year in Lawrenceville, and scrutinized closely the condition of the firm. I remained in business till the 18th September, 1856."

Defendant then introduced in evidence, a second set of interrogatories for said *Thompson Allen*, the answers to which are as follows:

"If he ever said in answers to any other interrogatories, that the business of Allen & Stanford was closed on the 18th of September, 1856, he was mistaken; for he well knows that the partnership was dissolved the 18th September, 1855; he is positive of this, because he has the original papers before him dissolving the partnership, and because he left Georgia 11th January, 1856, and has never been back since, and is certain it was dissolved the September preceding. He does not feel disposed to restate what he testified to in other interrogatories, or to attempt to correct statements upon the mere *ipse dixit* of counsel propounding the question; if the interrogatories were before him, he could then refresh his memory, and be able to correct any errors in his former answers, that might become apparent to his mind. He is of the impression that his answers to the other interrogatories referred to, contain all the information he has on the subject of the notes of witness to the plaintiffs in this case; he cannot say, with certainty, whether the firm of Allen & Stanford was largely indebted to plaintiffs from the spring of 1853, but the bills of merchandise which, he presumes, are all accessible to defendants, will show the exact amounts, and the dates of all the indebtedness of said firm to plaintiffs. As to entries on the books of Allen & Stanford, he declines to answer from memory, as the entries are the best evidence, the books not being before him, witness. He must again decline to answer, whether or not he had drawn all his stock out of the firm, the first year; because he cannot do so with accuracy, not having the books before him, and respectfully refers to the books, as the best evidence to show what amount was drawn from the concern, the dates of drawing, and the amount of leather or other goods, or money, which was paid into the firm by defendants."

Cross Examined.—" He has not a copy of the interrogatories heretofore answered in this case, before him, and that his answers to the first direct interrogatories will fully explain the reason of his answering differently as to dissolution of partnership. If the assumption in said interrogatories be true, that he did answer in the first instance, that the partnership was dissolved 18th September, 1856. He has no books before him; therefore, he makes no statement from memory or otherwise, as to entries in the books of Allen & Stanford; knows nothing more."

The testimony on both sides being thus closed, after argument of counsel, the Court charged the jury as follows:

"The law of partnership on the point in controversy is, that one partner cannot apply the funds of the partnership to the discharge of his own individual debts, so as to bind the other partners, without their consent. The reason is, and it goes upon the ground, that the right of the other parties to the fund, is not divested by its transfer. The fraudulent partner having no authority to dispose of their interest, without their consent, and beyond the scope of the partnership. Whether the money paid was the funds of the partnership or not, is for the jury to determine from the evidence. If the defendant, Stanford, knew of the application of the fund, and found his partner charged with it on the firm books, and did not object to the payment, or that he assented to it, or approved it, or acquiesced in it, without complaint, (and the jury must determine these facts from the evidence,) then Stanford would be bound, and have no right to recover the money back. But if, on the contrary, the jury are satisfied from the evidence, that the money paid was the funds of the partnership, and that Allen applied it to the payment of his own debts, without the knowledge or consent of Stanford, and that Stanford did not in any way approve it or assent to it afterwards, then they ought to find the same paid as credit, to be placed upon the notes, and find the balance due on the three notes, principal and interest, with costs." *Rogers and Son vs. Batchelor et al.* See 12, *Peters.*

To which charge the plaintiffs, by their attorneys, excepetd, and assign the same as error; because they insisted before the Court, and so requested him to charge, that the plaintiffs, Wiley, Banks & Co., must have participated in the fraud alleged against Allen, or have had some notice, express or implied, that the money was partnership money, or at least, that the circumstances attending the payment to them or their counsel, Nathan L. Hutchins, Esq., of the money in dispute„ must have been such as to put them upon enquiry as to whether or not said money belonged to the firm or to Allen individually. To which refusal to charge, and to the charge, so far as it is in conflict with the principle that Wiley Banks & Co. must be shown to have had notice, or at least reason to suspect, so as to be put upon enquiry, that the payment was made in partnership funds, the plaintiffs, by their counsel, excepted and now except, and assign the same as error.

E. & W. J. Peeples; and James Jackson, for plaintiffs in error.

Stanford, *in propria persona*, *contra*.

By the Court.—Lumpkin J. delivering the opinion.

Allen & Stanford being partners in merchandise, Allen draws eight hundred and forty dollars in money from the store, charges himself with it on the cash-book, and applies it in payment of an individual note which he owes to the plaintiffs, Wiley, Banks & Co.; and the question is, whether they can be compelled to allow this amount to go as a credit upon the firm debt of Allen & Stanford, owing them, unless they, or their agent, Judge Hutchins, had notice, express or implied, that the $840 was partnership money; or, at least, unless the circumstances attending the payment were such as to put them upon enquiry as to the rightfulness of this payment.

In support of the affirmative of the foregoing proposition, the defendant in error relies on the case of *Rogers against Batchelor*, (12 *Peters' Rep*. 221,) where it was held, that the funds of a partnership cannot be rightfully applied by one of the partners, to the discharge of his own separate, pre-existing debts, without the express or implied assent of the other parties; and further, that it makes no difference in such a case, that the separate creditor had no knowledge, at the time, of the fact of the fund being partnership property.

The difference between the payment out of *money* belonging to the firm, and the appropriation of the property or effects of the partnership, does not seem to have been taken, or occupied the attention of the Court in that case. One of the authorities cited to sustain the judgment of the Court, was that of *Dob & Dob vs. Halsey*, (16 *Johns. Rep.* 34,) where the Supreme Court of New York held, that if one partner delivers partnership property to a third person, who receives it, *knowing* that it is partnership property, in payment of his individual debt, in an action by the partners against the individual creditor of the individual partner, for the price of the goods, the debt of the one partner is not a defence or set-off against all the partners.

Of course not. For, in the first place, the title of the partners had not been divested by the individual appropriation of their property by one of them. And, in the second place, the separate creditor received the partnership property, *knowing* it to be such. He participated, therefore, in the fraud attempted to be practiced by the individual partner upon his associates.

I would respectfully submit, that the decision in *Johnson* is not a precedent for that in *Peters*. And further, that in every case quoted by Judge Story, both in maintenance of his judicial opinion and the same doctrine enunciated by him in his *Treatise on Partnerships*, the party knew, or had, at least, good reason to believe, that he was taking from his debtor the joint funds of the co-partnership.

But the main purpose for which I adverted to the case of *Dob and Halsey* was, to show that the New York Court comprehended the distinction between a payment in money and property. Spencer says: "Had Moore paid ,the defendant the debt due to him, in money which he had taken out of the partnership fund, it would have presented a different question. *Such a payment would have been valid, in the absence of all proof that the defendant knew that the money of the firm had been thus misapplied.* In such a case, there would be ground for presuming that the transaction was fair, and that the debt had been paid out of the private funds of the partner indebted."

But the principle decided in the leading case of *Miller vs. Pace*, (1 *Burrows*, 452,) and reviewed in *Smith's Leading Cases*, 1 *vol.* 356, introduces a new element into this discussion. The payment by Allen to Hutchins, as the agent of Wiley, Banks & Co., was in money, either coin or bank bills. If the transaction was *bona fide*, and the record concedes that it was, can the money be recovered back? According to *Miller and Pace*, which is considered settled law, it would seem that it could not be. Had Allen robbed the till of the store, or of the store of any one else, and applied the money to the discharge of his debt, *in favor of currency*, neither his partners, nor any other owner, from whom it had been stolen, could recover it back, unless some collusion or unfair dealing could be shown. It was said by Lord Mansfield, in delivering the opinion of the Court of King's Bench, in *Miller and Pace*, that the general course of business, and the consequences to trade and commerce, which would be much incommoded by a contrary determination, that money never should be followed into the hands of a person who, *bona fide*, took it in the course of currency, and in the way of business.

Unless, then, it can be shown that the payment was not only covinous on the part of Allen, who paid his private debt with the money of the firm, without the consent or knowledge of his partner, but also, that the separate creditor, or his agent, took the money under circumstances which were calculated to apprise him that Allen had no right to this money, the defendants below must fail in their case. Perhaps, one of the circumstances calculated to awaken suspicion, and excite enquiry, would be, the insolvency of Allen, provided it existed at the time, and was known to Wiley Banks & Co., or their agent.

Judgment reversed.

BROWN & SANFORD, plaintiffs in error, vs. JOHN L. McCLUSKEY, defendant in error.

To authorize a creditor to take out an attachment, either under the Judiciary Act of 1799, or the Attachment Law of 1856, the creditor must swear that his debtor "absconds," To swear that he has absconded, is not sufficient.

An affidavit in attachment cannot be amended.

Certiorari, in Hall Superior Court. Decided by Judge HUTCHINS, at September Term, 1858.

Brown & Sanford sued out an attachment against McCluskey, returnable to the Inferior Court of Hall county, at January Term, 1858. At said Term of the Inferior Court, McCluskey moved to dismiss the attachment, because the affidavit stated, as the ground for suing out the attachment, that the defendant "*has absconded.*" Plaintiffs moved to amend the affidavit, by inserting in lieu of the words "has absconded," the word "absconds"—they being in Court, and ready to verify said amendment. The Court refused the amendment, and dismissed the attachment. Plaintiffs excepted; and the case being brought up by *certiorari*, before the Superior Court, that Court affirmed the judgment of the Inferior Court, and dismissed the *certiorari*, and plaintiffs except.

E. M. Johnson, for plaintiffs in error.

Law, *contra.*

By the Court.—Lumpkin J. delivering the opinion.

There are two questions in this case:

1st. Is the affidavit in attachment good as it stands? The creditor swears that his debtor "has absconded." An oath in this form was held, by this Court, to be insufficent, in *Levy vs. Millman and others,* (7 *Ga. Rep.* 167.) The Attachment Act requires the plaintiff to swear that he "absconds." To say that the defendant "has absconded," may relate to the past; and at the time the deposition is made, he may have a notorious residence in the State. True, it is added, "so that the ordinary process of law cannot be served upon him." But this is a deduction or conclusion, from the fact previously stated.

2d. Can the affidavit be amended? It is difficult to conceive how an oath, which is a necessary preliminary step, can be changed so as to sustain any proceeding which is based upon it. It is true, that the Attachment Law of 1855—56 provides that no attachment shall be void in consequence of a failure to comply with the forms therein prescribed; still, the right to amend would seem to be restricted to the "attachment," "bond," "declaration" and "return" of the levying officer. The omission of the affidavit is significant, and must mean something.

Judgment affirmed.

PIERCE BAILEY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

A defendant pleading former acquittal, must show a record of acquittal. If on an indictment for murder, the defendant excepts to the judgment of the Court, and obtains a new trial, on a verdict of guilty of manslaughter, the whole record of acquittal is set aside, and there is nothing to support the inference of acquittal of murder.

Murder, in Taliaferro Superior Court. Decision by Judge THOMAS, at February Term, 1858.

At August Term, 1852, Pierce Bailey was indicted for the murder of his slave, and the grand jury returned a "true bill." At August Term, 1856, he was put upon his trial, and found guilty of voluntary manslaughter. Bailey carried the case to the Supreme Court, and at the Athens Term, Nov. 1856, that Court pronounced the following judgment:

This case came before the Court upon a transcript of the record from the Superior Court of Taliaferro county, and after argument had, it is considered and adjudged that a new trial be granted, it being the opinion of this Court that the Court below erred in not requiring the questions mentioned in the bill of exceptions to be put to the jurors as requested by the accused.

At the February Term, 1858, the defendant Bailey was again put upon his trial, and withdrew his plea of the general issue, and pleaded specially:

1st. That the former finding in this case by the jury of "voluntary manslaughter," was an acquittal of the defendant of the crime of murder, and he cannot again be put upon trial for said offence.

2d. That having been once put in jeopardy of life, upon his former arraignment and trial for the crime of murder, he cannot again be put upon trial upon the same indictment for the same crime.

The Solicitor General demurred to the foregoing pleas.

The Court sustained the demurrer, overruled the defendant's pleas, and assigned that they constituted no sufficient bar to putting defendant again upon his trial for murder as charged in the indictment.

To which decision counsel for defendant excepted.

F. H. CONE, for plaintiff in error.

T. M. DANIEL, Sol. Gen., *contra.*

By the Court.—McDONALD, J. delivering the opinion.

The verdict of the jury finding the plaintiff in error guilty of voluntary manslaughter was set aside and a new trial ordered at his instance. If the verdict had stood, it would have been an effectual bar, unquestionably, to another prosecution for murder, for the same homicide. The indictment charged the offence of murder only; but it was competent for the jury on the trial, not finding malice, to convict the accused of manslaughter. Such a conviction, without more, is an implied acquittal of the higher charge of murder. The plaintiff in error, when he was convicted of manslaughter, was acquitted of murder, but he moved to set aside that verdict; and this Court set it aside and ordered a new trial. When he was called for trial, after the reversal of the judgment, he withdrew his plea of not guilty, and pleaded in bar his former acquittal; and, that, having been once put in jeopardy of life for the same offence, he cannot now be put on his trial for the same crime. The latter plea was not insisted on in this Court.

A plea of former acquittal "is of a mixed nature, and consists partly of matter of record and partly of matter of fact. The matter of record is the former indictment and acquittal, the matter of fact is the averment of the identity of the offence, and of the person as formerly indicted. As to the matter of record, it is now settled to be absolutely requisite to set forth in the plea, the record of the former acquittal," &c. 1 *Chit. Crim. Law*, 459. The pleas in this case, conform to this simple rule of pleading, but go one step further and show, that the verdict relied on as an acquittal of the plaintiff in error, was set aside, and that a new trial was ordered. The Solicitor General demurred to the pleas, and the Court below sustained the demurrer. If the defendant rely upon the record, as he must, for his acquittal, he must plead and prove a *subsisting* record of acquittal. It is no record if set aside. But it is argued, that the acquittal of the offence of murder, remains, although the verdict of guilty of manslaughter is set aside. The verdict of guilty of manslaughter is only an implied acquittal of the accused of the charge of murder, and if the verdict from which the inference is drawn, is set aside, nothing is left to sustain the inference. The verdict and its incidents fall together.

The effect of the reversal of the judgment of the Court below, is to annul it as effectually as if it had never been rendered. The plaintiff in error moved for the reversal of the judgment on which he proposes, now, to rely as a subsisting judgment establishing his acquittal. The provisions in the Constitution of the United States, and law protecting a person from a second prosecution for the same offence will be enforced to its letter in favor of persons prosecuted a second time. But he must show a record. There can be no other evidence of either acquittal or conviction. If a party be accused of a high offence, and on an indictment therefor, he is convicted of one of inferior grade, he must be careful, how he removes the only barrier to a second trial. The State can in no case move for a new trial on the acquittal of a person indicted. Our statute declares that in criminal cases, the jury shall be judges of the law and the facts, and the Legislature has effectually guarded this prerogative of the jury against invasion by the Courts to the prejudice of a person indicted, by enacting that on the acquittal of any defendant or prisoner, no new trial shall on any account be granted by the Court. So imperative are the terms of the statute, that the Court will not grant a new trial on the ground that the verdict of the jury is contrary to evidence even at the instance of a defendant charged with murder, but convicted of manslaughter, so as to subject him to a second trial for murder, although the Court may believe that he ought to have been convicted of murder. *Jordan vs. The State of Georgia*, 22 *Ga. Rep.* 558. But a defendant relying on such acquittal must show a record of it. If he show that it has been annulled and set aside it cannot avail him. We therefore affirm the judgment of the Court below.

Judgment affirmed.

Doe *ex dem.* Vickery, plaintiff in error, vs. Roe and Benson, tenant in possession, defendant in error.

[1.] The certificate of a clerk to a copy deed offered in evidence, was in this form: The within and foregoing writing is a true copy of a deed made by B. to T. on record in my office in book R. R., page 75.

Held, That the certificate was sufficient to render the copy admissible.

[2.] There were interlineations in the certificate, but they were in the same ink and handwriting as the interlined writing.

Held, That this did not so vitiate the certificate as to make it inadmissible.

[3.] Although one holds another's land adversely for seven years, under color of title and claim of right, yet if he then *abandons* the land he cannot claim the benefit of the statute of limitations.

[4.] A grant was issued to L. B. in 1788. Subsequently, nothing was heard of him, or of any heir of his, or of any will made by him.

Held, That by 1854, it was to be presumed, that he was dead, and, that the land had escheated to the State, on due inquest; and further *held*, that if this inquest was one happening before the escheat Act of 1801, the land was subject, at any time after the inquest, to be regranted by the State, under the Head Rights laws; if one happening after that Act, the land was not so subject, that Act requiring the escheator, to sell and convey the land himself.

Ejectment, and motion for new trial, in Hart Superior Court. Before Judge James Thomas, October Term, 1858.

This was ejectment by Doe & Joseph Vickery, against Roe casual executor, and John B. Benson, tenant in possession, for a tract or parcel of land, situated in the county of Hart.

Upon the trial, plaintiff introduced in evidence a grant from the State of Georgia, to Joseph Vickery, the lessor, for the land in dispute, dated 2d August, 1854; proved possession by defendant at the commencement of the suit, and closed.

Defendant submitted and offered in evidence the grants, deeds and copy deeds, under which he claimed, of which the following is an abstract, viz:

A grant from the State to Lamentation Braswell, dated 17th February 1788, and proved that this grant covered the land in dispute.

Copy deed from R. Middleton, Sheriff, to Isaac Bull, dated 4th March, 1806; admitted as color of title.

Copy deed from Bull to George Turman, dated 29th October, 1814, admitted as color of title.

Copy deed from Sam. Turman, administrator of George Turman, to William Pulliam, dated 10th November, 1832; admitted as color of title, conveying one moiety of the land included in the grant to Braswell.

A deed from Matthew Pulliam to William, dated 3d January, 1839.

A deed from Thomas J. Turman and James M. Sandrige, administrators of Parmelia Pulliam, to Eustin Fortson, dated 1st December, 1846.

Copy of the last will and testament of Eustin Fortson, and letters testamentary to his executors, dated 1st September, 1851.

Deed from Thomas J. Fortson, to John W. Smith, dated 5th November, 1853.

Deed from John W. Smith to defendant Benson, dated 19th December, 1854.

Deed from George G. Fortson to Dyer and Vickery, dated 5th November, 1853.

Deed from Dyer and Vickery to Burrel Mitchell, dated 12th February, 1855.

Deed from Heely Fortson to John G. McCurry, dated 8th March, 1855; also, a deed from Benjamin Fortson to same; same date.

Relinquishment from John G. Murry to Benson & Mitchell, dated 21st March, 1855.

James Carpenter sworn on the part of defendant, testified: That he had known the land from his earliest recollection; first as the Turman, then as the Pulliam tract. Joseph Vickery was living on it prior to 1818; heard Vickery talking to witness' father, when he came to split rails for him, some years before he, witness, moved away, in 1813. Vickery said he held under Turman. On one occasion he said he had a mind to run out some of the land, that he did not believe that Turman's title was good. Witness was then absent from the country till about 1828 or 1830, and on his return Vickery was still living on the land, holding under Pulliam: Pulliam, Vickery and witness were all on the land together, soon after his return to this country. Pulliam proposed to sell to witness, and Vickery showed the lines, and witness expressing doubts of Pulliam's title; Vickery said that the title was good. Two or three years afterwards, Vickery moved off, and said that Pulliam wanted him to do what he would not do. William Pulliam died, leaving no child or children, but a widow, Parmelia, who was the daughter of George Turman, outlived her husband four or five years.

Samuel B. Sanders testified: That he had known the land all his life; first as the Bull, then as the Turman, then as the Pulliam, then as the Fortson tract. Joseph Vickery settled on the land many years ago; knows that he was on the land and went off, but cannot recollect the years Vickery was tenant of Pulliam; he left the land about twenty years ago. In a settlement with Pulliam, witness paid a claim which Pulliam had on Vickery, which Vickery afterwards ratified. Witness was Vickery's agent in the transaction; do'nt know whether the claim was for rent. Pulliam was here occasionally attending to the land; never saw him on the land. A year or two before Vickery moved off, Joel Dyer went on the land and held under Pulliam and cultivated some ten or fifteen years after Vickery left, till he wore out the land. Witness is over fifty years old, and has lived on the adjoining land all his life, and never heard of Lamentation Braswell.

Calvin P. Sanders: Has known the land all his life; Vickery was tenant on it under Pulliam; he lived on it a few years, and then moved off, because Pulliam required him to pay rent; the land was first known as Bull's, then as Turman's, then as Pulliam's, then as Eastin Fortson's; was present at Elberton about twenty-five years ago, when Pulliam told Vickery he must move off or pay rent; Vickery said he wanted to stay long enough to get pay for his improvements, but would not pay rent. Two or three years ago, when the lawing began, Vickery admitted to witness that the conversation above stated with Pulliam had occurred, and said, that he was not lawing or contending for the Fortson tract; is about fifty years old; lived in the neighborhood all his life, and never saw or heard of Lamentation Braswell.

Elias Vickery testified: That some twenty or twenty-five years ago, witness and his father and his uncle Joseph (the plaintiff,) were on the road to Elbert Court House, when plaintiff said that Pulliam required him to pay rent, and rather than do it, he would move off, which he did in a year or two.

Lemuel Scott, for defendant, testified: That the land was said to be Pulliam's, Eastin Fortson bought it. Witness was at Fortson's and tried to purchase land from him, and Fortson made him his agent by writing; has searched for the writing, but cannot find it; acted as agent from 1846, till a little before Fortson's death, some seven or eight or ten years; thinks not less than five years.

Thomas J. Thornton, for defendant, testified: That William Pulliam died about sixteen years ago, leaving his wife, only heir and distributee, who was a daughter of George Turman.

Van D. Lacy, proved: That William Pulliam lived about fifteen or sixteen miles from the land, and Fortson about twenty miles from it.

Plaintiff introduced in evidence, the record of the case of *Joseph Vickery vs. Rachel Dyer*, tenant in possession; also, the record in the case of *the same vs. Lemuel Scott;* the one to September Term, 1854, the other to September Term, 1855, of Hart Superior Court.

Daniel M. Johnson, for plaintiff, swore: That he was fifty-six years old, had always lived in five or six miles of the land in dispute, and never knew or heard of Lamentation Braswell.

Hugh McLane, for plaintiff: He had always lived in the neighborhood, and Joel Dyer was sent to the Penitentiary in 1839 or 1840.

Sanders Dyer for plaintiff, proved: That his father, Joel Dyer, made about three crops on the land since his earliest recollection, and that he left sixteen or seventeen years ago; at his first recollection, his father was tending the land. Witness is about twenty-eight years old. Rachel Dyer did not live on the land. Witness' father paid Pulliam twelve dollars rent a year; do'nt know how long his father tended the land before his recollection. Lemuel Scott lived where witness' mother, Rachel Dyer, lived and died.

Defendant proved, that the land claimed and sued for in the suits against Rachel Dyer and Lemuel Scott, the records of which were offered in evidence, was not in the Braswell survey.

Here the testimony closed.

Defendant requested the Court among other things, to charge the jury:

1st. That if the title had passed out of the State by a grant to Lamentation Braswell, prior to plaintiff's grant, then plaintiff cannot recover.

2d. That if the State once granted the land prior to plaintiff's grant, the State had thereby divested itself of all title and could not grant it again, so as to convey a valid title to the last grantee.

3d. That if there was possession of the land for seven years by any person, after the title had once passed out of the State, under color of title and claim of right, prior to this suit, then the jury should find for the defendant.

The Court refused to give in charge the first and second requests, but charged the third. To which plaintiff excepted.

The jury found for the defendant, whereupon plaintiff moved for a new trial, upon the following grounds:

1st, 2d, 3d, and 4th. Because the verdict is contrary to the evidence, and the weight of evidence, to the charge of the Court, and the law.

5th. Because the Court erred in admitting in evidence the copy deed from Isaac Bull to George Turman; the original being the best evidence or its non-production first accounted for, and also, because the Clerk's certificate was insufficient to authenticate said copy, and because of the interlineations therein, which were not explained or accounted for.

6th. Because the Court erred in admitting in evidence the deed from Samuel Turman, adm'r of George Turman, to William Pulliam, the same having been altered.

7th, and 8th. Because the Court erred in its charge to the jury.

9th, and 10th. Because of the improper conduct of one of the jurors who tried the case. [Said conduct set out in these two grounds.]

The Court overruled the motion for a new trial and plaintiff excepted.

VANDUYSER and THOMAS, for plaintiff in error.

HESTER & AKEMAN, *contra.*.

By the Court.—BENNING, J. delivering the opinion.

Ought the Court to have granted the motion for a new trial?

I shall begin with the *fifth* ground of the motion.

That ground contained three specifications. Of these, the first was abandoned, as having been taken by mistake.

The second was, that the Clerk's certificate was, that the copy of Bull's deed to Turman, was a copy of the *deed itself*, and not a transcript from *the record* of deeds. The certificate was in this form, "that the within and foregoing writing is a true copy of a deed made by Isaac Bull, to George Turman, on record, in my office, in Book R. R. p. 75."

In the loose language of common parlance, it is not unusual to call the record of the deed, the deed itself. An applicant to the Clerk, for a copy from the record, will say, "give me a copy of such a deed from the record;" meaning, and being understood to mean, a copy of the record of that deed.

[1.] The Court below thought that, all the circumstances considered, the Clerk used the word, "deed," in this sense of the record of a deed. And we think so, too.

And even if the deed, and not the record of it, had been what was meant, I myself should still have thought the copy admissible. Even in that case, the copy would, it is to be presumed, have been "a copy" or "transcript" of a "document or paper of file," in the office of the Clerk—of file there, for record; and the Act of 1819, (*Pr. Dig.* 215,) says, that the certificate of any public officer, "shall give sufficient validity to any copy or transcript of any record, document or paper of file, in the respective offices under their control," "to admit the same as evidence."

The third specification was, as follows: "That the certificate of the copy deed was not admissible in evidence because of the interlineations therein, the same not being accounted for, nor explained.

[2.] The interlineations were in the same ink, and the same hand, with the writing interlined. The Court below concluded, therefore, that the interlineations did not vitiate the certificate, and we think that this was a proper conclusion. In such a case, it is to be presumed, that the interlineations or erasures are rightfully made.

We regard then, the fifth ground of the motion as insufficient.

The sixth ground differs in no essential particular, from this third specification of the fifth ground.

The seventh ground was the charge, "that if there was possession of the land for seven years, uninterruptedly, by any person, after the title had once passed out of the State, under color of title and claim of right, prior to" the "suit, the jury" should "find for the defendant."

The eighth ground was the same in substance as this seventh.

And we think it true, that there *was* error in this charge.

[3.] 1st. We think, that even if the title to land is out of the State, yet it does not thence follow, that in every case, seven years adverse possession, under color of title and claim of right, gives a title to the occupant. He may, at or after the seven years, *abandon* the land. If he does so, the previous possession counts for nothing. The abandonment is an admission, that there is a better outstanding title, and, that the possession was, while it lasted, really, in subordination to that title. It is saying, that the mistake, fraud, or something insufficient, was the cause of the adverse possession and claim of right.

2dly. But it may be, that the title to this land was in the State at the time of the existence of the two possessions proved. And if it was, those possessions could count for nothing, as the statute of limitations does not run against the State.

It does not follow, that because title to land, has once passed out of the State, it can never return into the State. It may revert to the State by escheat, on proper inquest of office. And if it does so revert, and the inquest be of the kind provided by the common law, the effect will be, to cause the title to return into the State, and the land to resume its old condition—the condition it had before it was granted. (3 *Black. Com.* 258.) Being in this condition, it will be subject to be re-granted, in the same way in which, it was granted; as, under the Head Rights Laws, if the first grant was under those laws; and, until so re-granted, it will belong to the State. Consequently, until so re-granted, it will be exempt from the statute of limitations, for that statute does not run against the State.

If, however, the inquest of office be of the kind furnished by the Escheat Act of 1801, the effect will be different. That Act requires the escheator, to sell and convey the escheated land, in the course of some months after the termination of the inquest. When, therefore, the inquest is of this kind, the title, though returning into the State, abides there but a short time; it soon passes out again, through the escheator, into whoever may become the purchaser of the land, at his sale of the land.

And the title having thus passed out of the State, the land will cease to be subject to be re-granted by the State, whether by the Head Rights Laws, or any other, there being no law authorizing the issue of a grant for land to which the State has no title; and the land having got into private hands, will become subject to be affected by the statute of limitations.

It remains to apply what has thus been said, to the case in hand.

3d. A grant was issued to Lamentation Braswell, in 1788. He has never been heard of since. Nor does it appear, that he made any will, or, left any heir. It is, therefore, to be presumed, that, subsequently, to the grant, he died, and died without a will, or an heir; and, therefore, that the land escheated to the State, on due inquest of office. And it must be true that this inquest was one taken before the Escheat Act of 1801, or, one taken after that Act. If one taken before, then, it must have been an inquest at common law, and must, therefore, have had the effect, to put the title into the State, there to remain until the issuing of the grant to Vickery, in 1854, when it passed out of the State a second time, and entered into Vickery. Consequently, if the inquest was one taken prior to the Escheat Act of 1801, then it must be true; 1st, that the title was in the State at the times of the existence of the possessions proved, and, therefore, that such possessions could not affect it; 2dly, that the grant to Vickery, was good, and conveyed the title into him.

[4.] On the other hand, if the inquest was one taken after the Act of 1801, it is to be presumed, that it was an inquest pursuing that Act; and such an inquest requiring as it would, the land to be sold and conveyed by the escheator, would cause the land, after remaining, a short time, the property of the State, to pass to the person to whom, the escheator should sell and convey it. Consequently, if the inquest was taken after the Act of 1801, it is to be presumed, that the title had, through the escheator's sale, passed out of the State, before the time of the grant to Vickery; and therefore, that that grant conveyed no title to him.

We think, then, that the Court, instead of charging the jury as it did, should rather have charged them thus:

1st. That even although a person may, under color of title and claim of right, hold another's land for seven years adversely, yet if he then *abandons* the land he has no right to claim benefit under the statute of limitations.

2d. That, although, it might be true, that a grant had been made to Lamentation Braswell in 1788, yet it did not thence follow, that the jury would, of necessity, have to conclude, that the grant made by the State to Vickery, in 1854, was void.

On the contrary, that if neither Braswell, nor any heir of his, nor any will made by him, had ever been heard of, subsequently to the date of his grant, the jury would be authorized if not required, to presume, that the land had by escheat, on due inquest, reverted to the State.

That, making this presumption, they must then determine whether the time of the inquest, was before, or after the Escheat Act of 1801. That if they determined that it was before, they would be bound to conclude, that the inquest was in the common law mode, and therefore, that it had had the effect, to make the land revert to the State, and remain the property of the State until the time of the grant in 1854, to Vickery, and consequently would be bound to conclude, that the land had, by that grant, passed to Vickery.

But, that, if they determined, that the time of the inquest was subsequent to this Escheat Act, they would be bound to conclude, that the inquest was one according to the mode prescribed by that Act, and therefore to conclude that though the land reverted to the State, yet, that it did so, merely to pass again from the State to some purchaser at a sale of the escheator, made according to the provisions of the Act; and consequently, that they would be bound to conclude, that there was no title in the State, at the time of the grant to Vickery, in 1854; and therefore, that no title passed to him by that grant.

The ninth and tenth grounds relate to the conduct of a juror, and it is needless to determine them, as the determination of the two groundss first disposed of, makes a new trial necessary. It is not likely, that such conduct will be imitated. It is equally needless to notice the first four grounds.

New trial granted.

RICHARD L. COOK, plaintiff in error, vs. the STATE OF GEORGIA, defendant in error.

[1, 2, 3.] On the trial of C., for harboring a slave, he moved to continue, on three grounds; 1st, the absence of a witness, C. 2d. The absence of a witness, L., who would swear, on a certain point, to the contrary of what, it was expected, two of the State's witnesses would swear on the point; 3d. excitement in the public mind against him. The witness, C., appeared before he had commenced with his evidence. The two State's witnesses were not examined on the said point, by the State. No particulars were stated by the counsel, to show the excitement to exist, nor did he give any reason for his opinion, or strengthen it, by the opinion of others.

Held, That the refusal of the Court to grant the continuance, was no ground for a new trial.

[4.] The plea of not guilty, is a waiver of the copy of the indictment, and of the list of the witnesses sworn before the grand jury.

[5.] The Court may require an incomplete verdict, to be made complete, before receiving it.

[6.] To "conceal" another's slave, is to "hide" and to "harbor" the slave. Therefore, a verdict which finds concealing and employing, finds *harboring*, *hiding*, concealing and employing.

[7.] It is not necessary, that an indictment for harboring a slave, should negative the *proviso* in the law relating to the offence.

Indictment for high misdemeanor, found and tried before Judge THOMAS, in Taliaferro Superior Court at August Term, 1858.

The indictment in this case charged Richard L. Cook with "concealing, harboring, hiding and employing in his own, service" the slave of another, to the injury of the owner. Upon this indictment he was arraigned and plead "not guilty."

The counsel for Cook then moved to continue on account of the absence of Mary Cook, by whom he expected to prove that she had been living at the house of Cook for from some time before, until some time after the alleged harboring, and that the slave had not been there during the time. And also on account of the absence of Wm. W. Lewis, by whom he expected to prove that he, Cook, owned but one pistol, and that he, Lewis, had that at the time of Cook's arrest, by way of contradicting some of the State's witnesses, who testified, on the committing trial, that he had one at that time. The Court three times requested the counsel to state all his grounds at once. No others were then stated. But after argument upon the motion, and when the Court was about to decide upon it, the defendant moved to be allowed to amend his showing, by filing his affidavit that there was so much excitement in the public mind against him, on account of the recency of the alleged offence, that he could not go safely to trial. The Court refused to consider the affidavit, overruled the motion, and dispatched a Bailiff with an order for Mary Cook and William Lewis to appear and testify in the case.

When a jury had been empanelled and the array was put upon the accused, he filed his affidavit as to excitement with the Clerk, and moved for a continuance on that account then. Which the Court refused.

Counsel for Cook then objected to his being tried under the arraignment, because he had not been furnished previously, or at the time, with a copy of the indictment and list of witnesses. The Court overruled the objection, and a copy and list were furnished him. Whereupon he moved to continue, on all of the foregoing grounds, which the Court refused.

A jury having been selected and sworn, counsel for the accused moved to take a verdict of not guilty, on the grounds following:

1st. Because the indictment charged no crime.

2d. Because the indictment did not allege that Cook "did not have an apparent well founded claim to the slave, and had not had him in peaceable possession for twelve months previous to the commencement of said harboring."

3d. Because the accused was charged with "concealing," "harboring," "hiding" *and* "employing," instead of concealing, harboring, hiding *or* employing.

4th. Because the indictment charged four distinct offenses.

The Court overruled the motion for a verdict. As the witnesses, who gave testimony before the grand jury, were successively called to the stand, counsel for the accused moved the Court to exclude them from testifying, *because* he had not been furnished with a list of them before arraignment, which the Court refused.

After the State had closed its testimony, counsel for the accused called for the witnesses, Mary Cook and Wm. Lewis, and asked time to consult with them. Mary Cook appeared, and counsel conferred with her at length. But the officer who had been sent with the order, made a return that he had "served it on Lewis by leaving a copy at his most notorious place of abode, he being away." Counsel for the accused then moved to suspend the trial until Lewis should be produced. The Solicitor General offered here, as he had when the first motion for a continuance was made, to "admit and not contest" what it was proposed to prove by Lewis. The Court refused the motion to suspend, and ordered the trial to proceed.

Brief of Evidence.

Benjamin F. Rogers, sworn, says: He was the owner of Austin for eighteen months, who had been run away three months; was caught 27th July, sold him 28th July after the arrest of defendant on this warrant. Witness lived in Warren county eight or nine miles from Crawfordville. First saw negro after he ran away in Crawfordville in custody of Mr. Humphrey, and does not recollect who else. Mr. Ellington was one, he thinks. Company had separated, and he does not remember who delivered him. Mr. Ellington claimed reward; not paid yet. Conversed with Mr. Nelson about July 21st and 22d about this runaway. Negro worth $600 to $700 before he ran away. Negro looked not very ragged nor dirty. On 27th July his clothes were torn by dogs. Did not look like the same negro he was before he ran away. Was worth then, or sold for $500. Looked poor, as if worked hard.

Thomas J. Peck, sworn, says: Went last of July with Sheriff to search Cook's house. Sheriff told Cook he had a search warrant. Cook allowed search. Sheriff, Humphrey, Tilly and witness entered dwelling and found nothing; entered smoke house, found platform and blanket; seemed for some one to lie on. Searched gin house and stables—found nothing, and returned to horses about sixty yards from stable and one hundred from the house. Circled with the dogs round the house. Dogs started the negro; negro ran rather towards the house, and was caught about 250 yards from the house. While circling saw Cook ploughing in the field. After catching negro, Sheriff arrested Cook. Negro was the same claimed and sold by Mr. Rogers; was taken to Crawfordville. Cook was in the house when the company came up. Owns no negro, nor hired any this year, as far as witness knows. Search made before breakfast. Cook went with party searching. After which party went off with dogs, and started trail on Cook's land. Negro was caught on Mr. Jones' land. Cook had pistol when in the smoke house door. Does not rem when he was arrested; thinks Coo have seen pistol on. d no coat or vest

John K. Nelson, sworn, says: He gro Austin; has known him twenty nted with ne- him in town, and last before that at M. Last saw July, this year, with him, Cook, whil n the 24th away. Saw negro pick up something was run boards, and walk along with Cook; the oked like Witness was 150 to 200 yards off. Kno talking. certain of his identity, as well as of Cook's well; is half hour high. Had been waiting three- one- hour before seeing Austin. Was sitting do one himself—did not wish to be seen. Negro ha eal Pants and shirt of cotton. Saw a woman, n. know who she was. Saw children. Wears s t short distances, but raises them for long distances.

George C. Fraser, sworn, says: He knows Au the negro first while Cook had him hired. Cook for a month or two. Negro hired his own time wh had him. This year he saw him, he supposed, in Mr. field. Mr. Cook had no one hired this year as knows. Negro corresponds in size and general appea with Austin. This was two or three weeks before the search warrant. Witness was off some 200 yards; it about 10 or 11 o'clock. Believes, from general appearan it was Austin. The field not near the public road. Neg was chopping. Does not remember that the corn, whic was half thigh high, was grassy. Negro did not turn to look at him. Did not see him there before this year. Did not watch before.

Mary Cook, sworn, says: She lives with her brother, the prisoner. He has wife and five children. Was at home on 24th; was there on the morning of 24th, half hour by sun; generally fed the chickens. Saw no negro. Brother keeps a little meal, &c., in smoke house. There was a plank in e State.

Cook r, and blanket on it; placed
b. Children placed planks there
moke house sometimes to be out
Benjamin F. Rogers s going on. Baby about eight
Austin for eighteen t in smoke house. Did not see
months; was caugh
the arrest of defen esides one-half mile from Cook's.
Warren county eig om Cook's house. Never saw negro
saw negro after h ember the amount of Cook's cotton
Mr. Humphrey, see Cook at Powelton; not there much
lington was on
he does not re rn, says: Cook has been to Powelton
claimed rew
about July 9, s sworn, says: He lives in Powelton.
$600 to $ several times a week. Cook generally left
ragged n Cook usually came in his working clothes.
dogs. I ff, sworn, says: He was present at search
ran aw k's. Saw the boards and blanket in smoke-
as if s two to two and a half feet high, and four or
T Was examining for signs. Didn't notice if
She nailed. Cook made no resistance to search.
a at gin-house and next in field, about 9 o'clock;
p started. Cook made no attempt to escape.

ne testimony had closed, and argument had, and
had been charged by the Court, they retired and
in the following verdict: "We, the jury, find the
ant guilty of concealing and employing." The So-
General moved to amend the verdict by adding "the
to the injury of the owner." Counsel for the accused
cted. The Court enquired of the jury if this was what
y intended to find. And upon receiving an affirmative
swer, allowed the amendment. Counsel for the accused
objected to the reception of the verdict. The Court overruled the objection, and ordered the verdict to be entered on the minutes.

Counsel for the accused moved for a new trial on the ground that the Court erred in all of the aforesaid rulings, orders and refusals.

Because the accused was not furnished previous to, nor at the time of arraignment, with a copy of the indictment and list of witnesses who gave the testimony before the grand jury.

Because the verdict does not find the accused guilty of any crime.

Because the verdict does not cover all the issues made.

Because the verdict was contrary to law, and contrary to evidence.

Because of newly discovered material evidence.

In support of the last ground for a new trial, the accused filed his own affidavit, and also the affidavit of Charles W. Gee.

The Court granted a rule *nisi* requiring the Solicitor General to show cause why a new trial should not be granted, who exhibited the several affidavits and the agreement of counsel as to facts, in answer to the last ground for a new trial.

The Court overruled the motion.

Afterwards, during the term, the accused moved to arrest the judgment of the Court:

1st. Because the indictment charged no crime.

2d. Because the indictment did not charge that the defendant did not have an apparent well founded claim to the slave, and had not been peaceably possessed of him twelve months previous to the alleged "harboring, hiding, concealing and employing."

Because the indictment charged four distinct crimes.

Because the verdict did not find the accused guilty of any crime.

Because the Court allowed the verdict to be amended.

Because the verdict was without evidence.

Because the verdict was contrary to evidence.

Because the verdict was without sufficient evidence.

Because the verdict was contrary to the charge of the Court.

The Court overruled the motion in arrest, and the defendant, by his counsel, excepted to all the aforesaid several rulings, orders and refusals, and now assigns the same as error.

WASDEN & NELMS, for plaintiff in error.

Solicitor General DANIEL, for the State.

By the Court.—BENNING J. delivering the opinion.

All the questions in the case, are contained in the motion for a new trial, and, in the motion in arrest of judgment. I shall confine myself, therefore, to those two motions.

I proceed first to the motion for a new trial.

The first three grounds of that motion, raise this question—did the Court below err, in refusing the motion for a continuance?

The grounds of the motion for a continuance, were three; 1st. The absence of the witness, Mary Cook; 2d. The absence of the witness, Wm. Lewis; 3d. excitement in the public mind, against the accused.

[1.] Mary Cook appeared before the accused had commenced to give his evidence to the jury, and she was examined by him. Therefore, there is nothing in the first ground.

The fact which the accused expected to prove by William Lewis, was, that he, the accused, owned only one pistol, and that, at the time of his arrest, Lewis was in possession of this. And he wished to prove this fact, to contradict two of the State's witnesses, who had testified at the committing trial, that he, when arrested, was armed with a pistol.

[2.] But the State did not on this, the trial before the jury, draw any such evidence from these two witnesses, or from either of them. And, therefore, if Lewis had been present at it, he could not have been examined on the point. His absence, then, as things turned out, was of no consequence to the accused.

The third ground was excitement in the public mind, against the accused.

He states no particulars in support of this ground; he merely gives what must be his own mere opinion on the subject; and he does this without giving his reasons for that opinion; and he fails to present any corroborating opinion from others.

The offence was, in grade, one of no great enormity—harboring a slave; nor was it attended by any circumstances of extraordinary atrocity.

There was, then, ground for a strong presumption, that the accused was mistaken in his opinion as to the excitement against him, in the public mind.

[3.] This presumption being opposed to the vague opinion of the accused, we think, that the Court was justified in acting on it, rather than on the opinion, and, therefore, was justified in holding this third ground of the showing, insufficient.

Such a ground must, from its nature, in almost every case, expect to encounter more or less of distrust and suspicion. It was not the only ground in *Howell's* case, 5 *Ga.*

The fourth ground was, that no copy of the indictment and no list of the witnesses who had testified before the grand jury, had been furnished to him before his arraignment.

But, nevertheless, he pleaded, not guilty. And his doing so is evidence, that he did not need such copy and list, for any purpose of his defence; and, therefore, is evidence from which, it was to be implied, that he had waived them. He was not bound to plead at all till he had been furnished with them. He might have ojected to being arraigned.

[4.] Therefore, we think this fourth ground also insufficient.

The fifth ground is the same in substance as the fourth.

The sixth occurs again, in the motion in arrest of judgment, and it will be there considered.

The seventh is the same in principle as the fourth.

The eighth has already been decided, in the decision of the first ground of the motion for a continuance. It does not appear, that Cook lost anything by the fact, that the witness, Mary Cook, was not present at the beginning of the trial; and unless it appeared that he thereby lost something, it is to be presumed, that he lost nothing. Mary Cook was present by the time she was needed as a witness.

The ninth ground has been already decided, viz., in the decision of the second of the grounds in the motion for a continuance.

The tenth ground is, that the Court erred in receiving the verdict, and in allowing it to be amended.

The verdict, as first returned, was in these words; "We, the jury, find the defendant guilty of concealing and employing."

The Solicitor General moved to amend this verdict by adding to it, the words; "the negro to the injury of the owner." The Court, on the jurors all answering, that this was what they intended, allowed the amendment to be made.

[5.] We see nothing wrong here. If the verdict was not full when returned, it was the duty of the Court not to receive it, but to require it to be made full. And the Court here, did no more than this. The amending was, really, the act of the jury, not of the Court. Indeed, we incline to think, that all that was expressed in the verdict after the amendment, was implied in it before the amendment.

The eleventh ground is, that "the verdict does not find the defendant guilty of any crime."

The verdict was, that the defendant was "guilty of concealing and employing the negro, to the injury of the owner."

[6.] The charge in the indictment was, that Cook "did conceal, harbor, hide and employ" the negro. The verdict contains nothing expressed, about *harboring* or *hiding*. But it says, that he *concealed* the negro. And we think, that to conceal a negro, is to hide and to harbor the negro. To conceal a negro, evidently is, to hide him; and it is also, to harbor him. It may be true, that there can be cases of harboring, that will not be cases of concealing. If one even openly and publicly protects a slave from his owner, the case will, perhaps, be a case of harboring. But it is likewise true, that there can be no case of concealing, that will not also be a case of harboring. To conceal then, is both to harbor and to hide. It follows, that the verdict, in finding Cook guilty of concealing and employing, found him guilty of *harboring*, *hiding*, concealing and employing. And that was the charge against him.

This eleventh ground is, therefore, not true.

The twelfth ground is but the eleventh, expressed in another form.

So is the thirteenth.

The fourteenth ground is, that the verdict was contrary to law, and was without sufficient evidence to support it.

We think differently. We let the evidence speak for itself.

The fifteenth and last ground, is, newly discovered evidence; viz., evidence going to show, that Nelson, one of the witnesses examined by the State, was to be a gainer by the conviction of Cook.

From what took place for and against this ground, the following particulars appeared, viz., that Rogers, the owner of the runaway slave, had offered a reward for him in the newspapers, the offer being to this effect—that he would give ten dollars for the delivery of the slave to him, and "fifty dollars, if found in the possession of any white man who" was "attempting to make off with him, with sufficient proofs to convict any such person or persons of the same;" that Nelson knew of this offered reward, and thought himself entitled to it; and that Rogers intended to recognize his claim to it, if made; that Mr. Bell, one of the counsel for Cook, knew of the offered reward, he having been called upon, to decide a question connected with the reward.

It is thus seen, that what turned out to be the fact, was really, not a newly discovered matter; Cook's counsel knew of the existence of the public advertisement, and he ought, in common diligence, to have assumed, that the witnesses would also know of it, and so he ought, on the trial, to have been prepared to bring out the existence of the advertisement and their knowledge of it.

Again, the terms of the offer, are—"if found in the possession of any white man who is attempting to make off with him, with sufficient proofs, to convict any such person or persons of the same." But the charge against Cook was, not for making off with the slave, but, for harboring him. So, strictly speaking, no witness could, on this charge, be entitled to the reward.

Lastly, we think, that if Nelson's evidence was struck out, the rest of the evidence would be sufficient to support the verdict.

We think, then, that this fifteenth ground was insufficient.

And so, we think, that the Court below was right, in overruling the motion for a new trial.

I proceed to the motion in arrest of judgment.

The second ground in that motion is but the first unfolded. So I pass to that second ground. It is, that the indictment does not charge, that Cook did not have an apparent well founded claim, to the slave, and does not charge, that Cook had not been peaceably possessed of him for twelve months next preceding the commencement of the harboring, &c.

The law on which this ground is put, is as follows: "Any person who shall conceal, harbor, hide or employ, in their own, or in the service of any other person or persons, any slave to the injury of the owner thereof, shall be guilty of a high misdemeanor, and on conviction thereof, shall be punished by imprisonment and labor in the penitentiary of this State, for a time not exceeding three years nor less than one year, at the discretion of the Court. *Provided nevertheless*, that on the trial of this offence, the person charged with it, shall be acquitted, if he or she had an apparent well founded claim, to the slave, so harbored or concealed, and had been peaceably possessed of him twelve months next preceding the commencement of such harboring or concealing." *Cobb Dig.*, 830–826.

The question is, was it necessary for the indictment to have negatived this proviso?

And we think that it was not. The part of this law *preceding* the proviso, made harboring, &c., to the injury, &c., a *complete crime*, with a punishment annexed. And what the proviso says, is matter to show, not, that harboring a man's slave in any case, is innocent, but, that in some cases it may be *excused* or *pardoned*. The proviso refers to matter which, if it exists, may be offered in excuse of the crime It is a crime in every case to harbor another man's slave—so says the first part of the law. But in some cases, there may be things which shall excuse this crime. So says the second part of the law—the proviso.

In this respect, the case differs from the case of *Elkins vs. State*, in the 13 *Ga. R.*, 435, a case founded on the law against retailing spirits without a license. That law does not make *all* acts of retailing without a license, a crime, but only those that may be done outside of "corporate towns."

But even were there no difference between the two cases, I should still myself, consider the indictment in the present case, sufficient. The indictment certainly "states the offence," "so plainly that the nature of the offence charged," might have been "easily understood by the jury," and when that is so, the Code says, that the indictment is to be "deemed sufficiently technical and correct." *Cobb Dig.*, 833.

[7.] We think, then, that this ground was not sufficient, to require the judgment to be arrested.

The other grounds in the motion to arrest the judgment, are the same as some of those taken in the motion for a new trial. They, therefore, have already been considered.

Our conclusion, then, is, that the Court below was also right, in overruling the motion in arrest of judgment.

So the judgment of the Court must be affirmed—generally.

Judgment affirmed.

Ezra Castleberry and Wife, plaintiffs in error, vs. Samuel S. Kelly and Wife, defendants in error.

To say to a white man, "negroes have been with your wife," meaning that negro men had had carnal communications with her, "and I can prove it," without the allegation of special damage, is not actionable.—McDonald doubting.

Slander, in Warren Superior Court. Tried before Judge Thomas, October Term, 1858.

This was an action on the case, for words spoken, brought by Samuel S. Kelly and wife, against Ezra Castleberry and wife. The declaration alleged, that Sarah Castleberry "did, on the 25th day of April, 1853, say of and concerning the said Martha," the wife of Samuel S. Kelly, in a conversation with the said Samuel, and in the presence of divers other citizens of said county, the following false and malicious words, to-wit: "Your wife's sister, meaning the said Martha, had a negro child, and that is not all, negroes have been with your wife," meaning that negro men had had carnal communication with the said Martha, "and I can prove it."

The jury found for the plaintiffs five hundred dollars. Whereupon, defendants moved in arrest of judgment on the following grounds:

1st. That no legal cause of action is set forth or contained in the plaintiffs' declaration.

2d. That the words charged to have been spoken by one of the defendants, taken with the colloquium and innuendoes, impute no crime to plaintiffs, or either of them, and no special damage is alleged to have been sustained by plaintiffs, or either of them, on account of the speaking of said words

The Court, after argument, overruled the motion in arrest of judgment, and defendants excepted and assign said decision as error.

Robert Toombs; and **Thos. W. Thomas**, represented by **Linton Stephens**, for plaintiffs in error.

E. H. Pottle, *contra.*

By the Court.—**McDonald**, J. delivering the opinion.

This is an action of slander. The words alleged to have been spoken of one of the plaintiffs, are: "Negroes have been with your wife;" meaning that negro men had had carnal communications with her, "and I can prove it." On the appeal trial, the jury found for the plaintiffs five hundred dollars damages. The defendants' attorney moved in arrest of judgment, on the grounds:

1st. That it is apparent on the face of the plaintiffs' declaration, that no legal cause of action is set forth therein against defendants.

2d. Because the words charged to have been spoken by one of the defendants, taken with the colloquium and innuendo, impute no crime against plaintiffs, or either of them, and no special damage is averred to have been suffered by the plaintiffs, or either of them, on account of the speaking thereof.

The Court below overruled the motion in arrest of judgment, and his decision is excepted to. The general rule in respect to actionable words is well established. They must be falsely and maliciously uttered, and impute to the person of whom they are spoken, a crime or misdemeanor, punishable in a temporal Court of criminal jurisdiction; or charge the person with an infectious disease which, if true, would be calculated to exclude him from society. This Court has recognized and acted on this rule. *Pledger vs. Hathcock,* 1 *Kelly,* 550; *Watson vs. McCarthy,* 2 *Kelly,* 57. The words set forth in the declaration do not impute an indictable offence.

Two of the members of this Court are decidedly of this opinion, and on the ground that, according to the penal code, to constitute a punishable offence, the act of adultery or fornication must be committed by two persons, both of whom may be indicted under the code, which declares that any man or woman who shall commit adultery and fornication, or adultery or fornication, *shall be severally indicted,* &c.; and that a negro man who commits the act with a white woman, cannot be indicted under the code; and that the laws against adultery and fornication, do not apply to free persons of color or to slaves. This view of the code is supported by legislative construction; for the General Assembly, in January, 1852, deemed it necessary to enact, that the offence may be committed by a white man with a woman of color. If the interpretation put on the penal code be correct, there is no law making it a punishable offence if committed by a white woman with a negro; and it follows, that words charging the act are not slanderous of themselves, because they do not impute an offence punishable by the law, and that the action therefore cannot be sustained. I am not entirely satisfied with this construction of the code, or the law upon which this action depends, and reluctantly assent to the judgment pronounced. The argument is not conclusive to me, that a negro man is not punishable under the law, before the appropriate tribunal for the punishment of slaves, and that a prosecution there is not an indictment within the meaning of the code; and that the white woman may not be separately indicted under the code. At the same time, I concede, that the code has no application to acts of this sort, committed by free persons of color and slaves among themselves. I am strongly of opinion, that the Courts of common law have the same power here, to determine what are remediable wrongs, in new cases, which could not possibly occur in England, as the Courts in that country have. Mr. Starkie, in his treatise on the action of slander, says: "but though in some instances the presumption of the prejudice to the plaintiff in society is a ground of action, yet it may be laid down as an established rule, that no charge or imputation upon the plaintiff, however foul, (except that of having an infectious disease,) will be actionable, unless it be of an offence punishable in a temporal Court of criminal jurisdiction." They have in England no inferior race as slaves, as we have here, with whom it is disgraceful to be on terms of social intercourse. Who can say that, there, a case of the sort before us would not be made an exception to this established rule? I will not enlarge on this subject, but say that I acquiesce in, rather than assent to, the judgment fully, that my brethren are so well satisfied is the law. As no special damage to the plaintiff is alleged, the judgment must be arrested, and so it is accordingly ordered.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH,
JANUARY TERM, 1859.

Present—JOSEPH H. LUMPKIN,
CHARLES. J. McDONALD,
HENRY L. BENNING, } Judges.

John Johnson, plaintiff in error, vs. The State of Georgia, defendant in error.

[1.] If an indictment contain two counts varying the charges against the defendant for the commission of the same act, when, on the conviction of the defendant on either, the grade of punishment *may* be the same, the Attorney General cannot be compelled to elect on which count he will put him on trial.

[2.] Whether a pistol is loaded with *ball*, is not an issuable fact on the trial of a prisoner on the statute for the offence of shooting at another, and it is not error for the Court to refuse to charge the jury, without such proof they cannot convict.

[3.] To refuse to give a request of counsel in charge to the jury, which is not authorized by the law or facts of the particular case, is not error.

Indictment for assault with intent to murder, &c. Tried before Judge Holt, in Richmond Superior Court, at November Term, 1858.

There were two counts in this indictment; one for an assault with intent to murder, the other for shooting at another.

Prisoner's counsel, at the opening of the case, objected to the joinder of these two counts in the same indictment, and moved that the State be required to elect upon which count it would proceed. The Court overruled the motion, and prisoner excepted.

After the testimony was closed, and argument by counsel, prisoner's counsel requested the Court to charge, "that there must be proof that the pistol was loaded with balls, as charged in the second count; otherwise, the prisoner could not be convicted under that count." The Court refused to charge as requested, and counsel for defendant excepted.

The Court, in commenting upon the evidence, said to the jury, that "he, the defendant, was there armed with a murderous weapon, with a riotous intent." To which remark defendant's counsel excepted.

The counsel for defendant further requested the Court to charge, "that if they (the jury) find that the defendant had left the yard of the prosecutor, then the prosecutor was not justified in following him, defendant, out into the street, and making an assault upon him." This request the Court refused to give in charge, and defendant excepted.

Judge Holt, in certifying the bill of exceptions, states, in relation to the exception to his remarks and comments on the evidence, that he did not comment on the evidence, but simply referred to it—hearing that defendant came to the house armed with a loaded pistol, and when there, behaved in a very riotous and disorderly manner; that the jury were referred to this evidence, in considering the question of malice, which they were instructed was an essential ingredient of the crime charged in the first count in the indictment.

E. J. Walker, for plaintiff in error.

Attorney General McLaws, *contra.*

By the Court.—McDonald, J. delivering the opinion.

[1.] The first ruling of the Court below to which exception is taken, is the refusal of the presiding Judge to compel the Attorney General to elect on which of the two counts in the indictment he would put the defendant on his trial. If the two offences charged against the prisoner may be joined in the same indictment, the appeal was to the discretion of the Court—the exercise of which, public justice seldom calls for, and this Court will not control. If the two counts were improperly joined, the indictment might have been demurred to, and the exception, therefore, comes too late at the trial.

The two counts were very properly joined in one indictment. They are founded on the same act of the defendant. If the shooting was with malice, he was guilty of the crime charged in the first count; if it was without malice, but not in self-defence, he was guilty under the second count.

[2.] It is difficult to conjecture the reason of the request of the Court to charge the jury, that "there must be proof that the pistol was loaded with balls, as charged in the second count, otherwise, the prisoner could not be convicted under that count," as there was evidence that the pistol was loaded with powder and balls. But the Act does not require that proof should be made that the pistol was loaded with balls. With what it was loaded was not an issuable fact, and the instructions ought not to have been given.

The assignment of error that the Court commented on the evidence, is not certified to by the Court, and we will not express an opinion on it. I will remark, however, that there can be no objection to the presiding Judge's summing up to the jury, the evidence on both sides of a cause, and submitting the points distinctly to the consideration of the jury, to which the testimony applies, taking care to express no opinion as to what had been proven, so as to avoid what the statute was intended to guard against—the power of the Court's influence with the jury upon the facts.

[3.] The last request made of the Court to charge the jury, by the counsel for the defendant, ought to have been refused. There is no evidence in the record that the prosecutor followed the defendant out of the yard into the street and assaulted him. But if this had been true, it depended on the nature of the assault, whether the defendant ought to have been acquitted on both counts.

Judgment affirmed.

JOHN HINES, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] An indictment for selling liquor to a slave, alleged that it was the second offence.

Held, That this was an allegation for the jury and not for the Court.

[2.] It is sufficient, if the offence be stated in the language of the code.

[3.] When liquor is furnished to a slave, it is to be presumed, *prima facie*, that it is furnished for the slave's own use.

[4.] The Act of 1850, which renders attorneys at law incompetent to testify in certain cases, does not extend to the Attorney General.

Certiorari, in Richmond Superior Court. Decision by Judge HOLT, at November Term, 1858.

John Hines was indicted in the City Court of Augusta, for the offence of *selling or furnishing* whisky to a slave, without the knowledge or consent of the owner of said slave. The indictment also alleged, that the defendant had been convicted of the same offence, at the May Term, 1856, of said City Court.

Upon the trial in the City Court, defendant was convicted, and the Judge sentenced him to imprisonment for thirty days, and to pay a fine of two hundred dollars—being the punishment authorized for a second offence.

The defendant sued out a *certiorari* to the Superior Court, and alleged that he had been unlawfully convicted and sentenced, and that errors had been committed in said City Court, in this, viz:

1st. That the indictment "charged the defendant with *selling to or furnishing* liquor to a slave," which were two separate and distinct offences.

2d. That the name of the owner of the slave was not set out in the indictment.

3d. That it having been alleged in the indictment that defendant had been formerly convicted of a similar offence, it was incumbent on the State to prove this fact to the jury; which proof was not furnished, but said City Court held that such proof was not necessary to be submitted to the jury.

4th. That said City Court charged the jury, that furnishing a slave in person with liquor, was *prima facie* evidence that it was furnished for the slave's own use.

5th. That said City Court, after defendant was convicted, allowed the Attorney General to establish a copy of the indictment under which defendant was formerly convicted, in lieu of the original, and allowed said officer to prove by his own oath, the contents of said original indictment.

6th. That the said City Court, upon the question of identity, raised by defendant's counsel, upon the motion to pass sentence, allowed the Attorney General to prove, by his own oath, that defendant was the same person who had been formerly convicted of the same offence—the presiding Judge passing upon that fact and refusing to refer it to a jury, as claimed and moved for by defendant's counsel.

Upon the hearing, and after argument, the Judge of the Superior Court held, that no error had been committed by the City Court, and dismissed the *certiorari;* and to this decision defendant excepts.

E. J. WALKER, for plaintiff in error.

Attorney General McLAWS, for the State.

By the Court.—BENNING J. delivering the opinion.

The offence charged against Hines, was charged as a second offence. The Court told the jury, "that no proof of a former conviction, was necessary." The jury found a general verdict of "guilty." Afterwards, the Court itself heard evidence, as to whether the offence was a second one, and on that evidence came to the conclusion, that it was, and sentenced Hines to a punishment much too great for any but a second offence.

We think, that the question, whether the offence was a second one, or not, was a question for the jury. In every such question, identity is involved, and that, beyond a doubt, is a matter for the jury. Nor is it meant, that all the other matters involved in the question, may not also be for the jury. It is a general principle, that whatever it is necessary to allege, it is necessary to prove. And no authority was read to us, to show that the case of an allegation, that the offence is a second one, is an exception to the rule, and we do not know of any such authority. The allegation is certainly one of the first importance to the accused, for if it is true, he becomes subject to a greatly increased punishment.

[1.] We think then that the charge was erroneous.

It is hardly necessary to say, that we are not to be understood as meaning, that it is not permissible for a jury to find the accused not guilty of this part of the charge, but guilty of all the other part of it.

This charge was made the third ground of the petition for the *certiorari.*

[2.] There is nothing in the first ground of the petition. The offence is stated in the language of the code.

The second, was abandoned.

[3.] The charge excepted to in the fourth, was, as we think, clearly right.

[4.] We see nothing in the fifth ground. The Court certainly, had the power to receive secondary evidence of a lost paper. The Attorney General was competent as a witness. We hardly think, that the State can be considered "the client" of the Attorney General, in the sense of the word, client, as used in the Act of 1850, rendering attorneys at law incompetent to testify in certain cases.

The disposition of the third ground, makes a disposition of the sixth.

The result is, that we think, that the Court below should have sustained the *certiorari* on the third ground, and have ordered a new trial.

Judgment reversed.

MARY E. PHILLIPS, and others, by their guardian, plaintiffs in error, vs. BRIGHAM, KELLY & Co., and others, owners of the steamboat Hartridge, defendants in error.

[1.] It is wrong to grant a nonsuit, if the evidence is sufficient to authorize the jury to find for the plaintiff, although it may not be sufficient to require them to do so.

[2.] If a common carrier deviates from the regular route, and the goods are lost, it is a conversion.

[3.] A motion to amend, made after nonsuit awarded, but not entered, is in time.

Trover, in Chatham Superior Court. Decision by Judge Fleming, at January Term, 1858.

This was an action of trover, for the recovery of 110 bales of cotton, which the declaration alleges was the property of plaintiffs, and which the defendants, the owners of the steamboat, the Charles Hartridge, "had found and converted," &c.

The facts of the case were about as follows: These 110 bales of cotton were lying at plaintiffs' landing on the Ocmulgee river, in the county of Pulaski, hauled there for the purpose of being shipped to Savannah. The captain of the steamboat, in going up the river for freights, took on board this cotton, and as plaintiffs allege, without any order from them, or without their knowledge or authority. The boat proceeded up the river for more cotton, and after getting in a full load, returned downwards *en route* for Savannah, and before reaching the place from which they took plaintiffs' cotton, she ran upon a snag in the river, and in the effort to run ashore, her boiler exploded, and the boat, together with all the cotton on board, except six or seven bales, was burnt.

After plaintiffs closed their testimony, defendants moved for a nonsuit, on the ground that *case* and not *trover* was the proper form of action. The presiding Judge, after argument, granted the motion for a nonsuit, but immediately upon the conclusion of the announcement of the opinion of the Court, and before the judgment of nonsuit was or could have been reduced to writing, and entered on the minutes of the Court, counsel for plaintiffs moved to amend the declaration by adding a count in case. To this motion defendants' counsel objected. The Court sustained the objection, and overruled and refused the motion to amend, and counsel for plaintiffs excepted.

Hon. C. B. Cole; and T. P. Stubbs; for plaintiffs in error.

J. E. Ward; and E. A. Nisbet, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the nonsuit right?

It was put upon the ground, that not trover, but case, was the remedy.

[1.] It is wrong to award a nonsuit, if the evidence is sufficient to authorize the jury to find for the plaintiff, although it may not be sufficient to require them to do so.

If there was a conversion of the cotton, trover was the proper remedy. This may be assumed. Of course, if trover was the proper remedy, the nonsuit was wrong.

It follows, that if the evidence was sufficient to authorize the jury to find that there was a conversion, the nonsuit was wrong.

We think, that the evidence was sufficient, to authorize the jury to find a conversion.

If the boat took the cotton from the river bank, without authority, that, it is clear, was a conversion. And the evidence was, perhaps, sufficient to authorize the jury to find, that the boat did so take the cotton.

[2.] If the boat took the cotton by agreement, but an agreement to carry the cotton to Savannah, and, instead of going the ordinary route to Savannah, went an extraordinary route, and while out of the ordinary route, the cotton was lost, that was a conversion. It would be a breach of the contract by *mis*conduct—something positive. And every such breach of such a contract is a conversion. *Wheelock vs. Wheelright*, 5 *Mass.* 104; *Stor. Bail, sections* 232, 269, 396, 413.

And the evidence was sufficient, to authorize the jury to find, that the boat did start to Savannah by an extraordinary route. The evidence was, that the boat, after taking the cotton on board, went *up* the river, some ten miles, and, that before it got back to the place at which it had taken the cotton on board, the accident occurred by which, the cotton was lost. And there was no evidence that this conduct was according to any usage.

Here, then, was evidence sufficient to authorize the jury to find a conversion, provided, the act of the boat, (i. e. of the master,) is to be considered the act of the owners, who are the defendants. And, as at present advised, we think, that it is to be so considered.

The question, whether the owner of a boat or other vessel, is liable for the tortious acts of the master, is one of great importance. And it was hardly argued at all, in this case.

And hence it is, that, we merely say, that, as at present advised, we think, that if there was in this case, a conversion by the master, it was to be deemed a conversion by the owners; for we wish the general question to be considered, as still an open one.

Our conclusion, then, is, that the Court erred in awarding the nonsuit.

[3.] And this being the conclusion, it becomes unnecessary to decide the question, whether the motion to amend ought to have been sustained. But as we have an opinion on that question, we may as well express it. We think that the motion ought to have been granted. 15 *Ga.* 110.

Judgment reversed.

JOSEPH A. GRAVES, et al., plaintiff in error, vs. SAMUEL WARNER, defendant in error.

A Deputy Clerk is authorized, in virtue of his appointment to administer to a party applying for an appeal, an oath that he is unable from his poverty to pay costs and give security for the eventual condemnation money.

In equity, motion to dismiss appeal, in Burke Superior Court. Decision by Judge HOLT, at April Term, 1858.

This was a cause in equity, *in forma pauperis*, pending upon the appeal.

Defendants moved to dismiss the appeal upon the ground, that no affidavit had been made or filed as required by statute; that the paper purporting to be an affidavit, executed and filed by complainant, upon entering said appeal, was not an affidavit, it being sworn to before the *deputy Clerk* of the Superior Court, who was not authorized to administer an oath.

The Court refused the motion to dismiss, and allowed complainant then to make oath and proceed with his cause.

To which decision defendant excepts.

John T. Shewmake, and A. H. H. Dawson, for plaintiff in error.

Snead, *contra*.

By the Court.—McDonald J. delivering the opinion.

The only question in this case is, whether the Deputy Clerk, who administered the oath to the applicant for an appeal, had authority in law to do it.

The Judiciary Act of 1799, vests the Clerks with power to administer all oaths appertaining to the business of their office. *Cobb* 574. The Legislature in 1817, for the convenience "of the good citizens of this State," authorized Clerks to appoint deputies. *Cobb* 206. The object of the Act was to supply a person with equal powers with the Clerk, in regard to all business pertaining to his office, that the public might not be put to inconvenience by his occasional absence. By law, appeals must be entered in the Clerk's office. It is the duty of the Clerk to attend to entering them; to receive and judge of the sufficiency of the security, in case security is required: to administer affidavits in cases where the party applying for an appeal is unable to pay costs and give security, &c. &c. If the deputy cannot perform all these office duties during the absence of the principal, the object of the law authorizing the appointment of deputies would be defeated. The law itself would be prostrate. Regularly, a deputy cannot have less power than his principal. *Salkeild,* 95. But we confine this strictly to the office business and duties of Clerk. We do not determine, that now the Clerk is vested with power to administer affidavits in relation to matters not pertaining to his office, that the deputy in virtue of his appointment is authorized to administer such oaths.

Judgment affirmed.

CHARLES J. CARPENTER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Verdict held not to be contrary to evidence.

Misdemeanor, in Richmond Superior Court. Tried before Judge HOLT, at November Term, 1858.

Charles J. Carpenter was indicted for receiving from a slave, without the written permission of the owner of said slave, eight hides, of the aggregate value of thirty-four dollars, the property of Daniel Kirkpatrick, sen'r.

The defendant pleaded not guilty.

Brief of Evidence—For the State.

Daniel Kirkpatrick, sworn: On or about the 24th of September, 1857, in Richmond county, I lost eight slaughtered beef hides, of the value of thirty-four dollars. They were taken from one of my houses, which was locked. The house was broken into. I found them at Carpenter's. I had a search warrant. The hides were found in the back part of the lot. There were other hides there. After the warrant was served, and about one half of it read, defendant said to me, Did you not receive a note from me? I replied that I had not. The question was repeated, with the same answer, and upon its being repeated the third time, I replied, that I was not in the habit of lying. He told Rhodes that he had the hides, and that a negro brought them there the night before. All this happened in this county.

Cross-Examined.—He said that he brought them there, or got them from a negro; dont know which. He said that he had written several notes to the butchers in the market: he pointed out the hides. If door had been opened, the hides could not have been seen from the street. The butchers and myself among the rest, give our negroes permission to sell meat after market hours; and it is usual for them to do so. It was ten or eleven o'clock when we went there.

James H. Rhodes, sworn : I arrested Charles J. Carpenter, on the twenty-fifth day of September, 1857, in this city. Was at the time a county constable of Richmond county. I arrested him with a warrant issued at the instance of Daniel Kirkpatrick, sen'r. It was a search warrant. When I walked in Carpenter's house, Carpenter came out from his dinner. I told Carpenter that I had a document for him. He asked me what it was. I told him that it was a search warrant. Carpenter appeared much excited. I told Carpenter that my object was to search for hides. Carpenter said that the hides were there, and that he got the hides from a negro about three o'clock in the morning. I told Carpenter that I must do my duty. I then proceeded to read the warrant; whilst reading the warrant, Daniel Kirkpatrick, sen'r., came in. Carpenter asked him if he had not received some notes from him. His answer was no. He asked him the third time; the reply was, that he was not in the habit of lying. Kirkpatrick said I want my hides. Carpenter said that he had written three notes to the butchers in the market. He asked him to whom he addressed them. He said to the bearer. Rhodes asked him, why he did not arrest the negro that brought the hides. Carpenter answered that he did not know that he had the authority. We all went back to a cow shed attached to the stable, the door of the shed was ajar. Upon entering the shed, Kirkpatrick identified his hides, eight in number; there were other hides there. Rhodes took Carpenter and carried him before Justice Levy. On his way he asked him, if he would ask him a question, if he would answer it? He told him to ask the question, and he would tell him, whether he would answer it or not. He then asked him, if any body was with Kirkpatrick when he came to Justice Levy's for a warrant? Rhodes answered him that there was. He asked if it was Capt. Campbell? The answer was no. Kirkpatrick did not say, that if Carpenter would pay him for all the hides that he had lost, that he would drop the prosecution against Carpenter.

The jury found the defendant guilty, but recommended him to the mercy of the Court.

The defendant moved for a new trial:

1st. Because the verdict was contrary to law.

2d. Because the verdict was contrary to evidence and decidedly and strongly against the weight of evidence.

3d. Because the Court charged the jury, that if the defendant received the hides from a negro, the legal presumption was, that the negro was a slave, and that said presumption must stand until rebutted.

The Court overruled the motion for a new trial and defendant excepted.

Millers & Jackson; and **E. J. Walker**, for plaintiff in error.

Attorney General **McLaws**, *contra.*

By the Court.—**Benning** J. delivering the opinion.

We see no error in this case. The only ground insisted on is, that the "verdict was contrary to the evidence and decidedly and strongly against the weight of evidence." But we think that the evidence was sufficient to support the verdict.

Judgment affirmed.

David J. Lamb, propounder, plaintiff in error, vs. **Benj. F. Girtman**, et al. caveators, defendants in error.

[1.] The Court was requested to charge, that if the testator "might have seen" the attestation, it is sufficient; that "it is not necessary, that he should actually have seen the attestation." The Court refused to give this charge, but said," if the attestation be in the same room, this is the law; otherwise, it is not."

Held, That the Court erred in not giving the request in charge, there being evidence to authorize the request.

[2.] It is a violation of the law of Georgia, for a testator to convey property to his slave.

[3.] The mere recognition of a void will, cannot make the will valid.

[4.] It is lawful to prove a trust, by circumstantial evidence.

[5.] The propounder joined issue with the caveator on the merits.

Held, That this was at least *prima facie* evidence, that the caveators were heirs and therefore, that a motion of the propounder to dismiss their appeal, on the ground, that there was no evidence, that they were heirs, was properly overruled.

Caveat to will, in Jefferson Superior Court. Tried before Judge HOLT, at December Term, 1857.

This was an appeal from the judgment of the Court of Ordinary, admitting to probate the will of Andrew Girtman, deceased.

The principal question before this Court was, whether the will was executed according to law.

The deceased being advanced in years, and of feeble health, sent for James S. Spier to write his will, and for Spencer G. Spivey and Zacheus L. Brown to witness it. The will was written according to the instructions of deceased, and was then signed by him in a room or hall adjoining his bed room, after which he got up, saying, "you are done with me now. I'm very weak; I'll go and lie down," and went to his bed room; one of the witnesses accompanying him to the door of his room "to help him." The subscribing witnesses then signed their names at the table in the hall; none of them seeing the testator, or knowing or recollecting the position he occupied in his bed-room at the time. The door between the rooms was open, and if testator upon going into his room lay down on his bed in the usual position he could not see the witnesses at the table where the attestation took place; if he lay with his head to the foot of the bed, or set up on the side of the bed, he could see the table, and he could see if from other points in his bed-room. After the witnesses had subscribed their names, and in about *fifteen minutes*, after testator had left the table, he was seen lying on his bed in a position from which he could not have seen the witnesses subscribe. None of the witnesses saw testator or knew where he was, that is, in what part of the room or bed he was, at the time they signed the will.

Upon the trial, during the examination of one of the subscribing witnesses, the presiding Judge remarked in the presence and hearing of the jury, that the will "bore upon its face, strong marks of suspicion." And to this remark, propounder excepted.

The testimony being closed, counsel for propounder requested the Court to charge the jury:

1st. That if the jury believe the testator might have seen the attestation of the will, it is sufficient; it is not necessary that he should actually have seen the attestation. The Court refused to give this charge, but said, if the attestation be in the same room, this is the law, otherwise it is not.

2d. That although the law required the attestation in the presence of the testator, yet there may be cases in which the strictness of this rule may be relaxed and the will be admitted to probate. The Court refused to give this charge.

3d. That although the will may not have been attested in the actual presence of the testator; yet if the jury believe from the evidence, that he, (testator,) sent for the attesting witnesses to witness the will; that he subsequently retained the possession of the same for a considerable length of time; that while in his possession he recognized the paper set up as his will; that he subsequently refused to alter the same; that he on several occasions, subsequent to the making of said will, expressly stated, that the paper set up was his will, then they may find the attestation to have been sufficient. The Court refused so to charge.

4th. That it is not unlawful for the testator to give to any one, any portion of his property, although such person so receiving the legacy were not of testator's kinsman. The Court charged as requested.

5th. That if by the third item of the will, the jury believe the property therein conveyed, vests absolutely in Bell, the legatee, that it is subject to his alienation, that it is liable to his debts and to distribution at his death; then that item is not a violation of the Acts of the Legislature of 1801 and 1818, preventing manumission. The Court charged as requested, but further charged that they must find this item free from the secret trust prohibited by law.

6th. That although it is a violation of the Act of 1818, to attempt to permit slaves by deed, will or parol to have the profits of their labor and skill, while in a state of *quasi* slavery; yet that such a provision involves the control of their own time, exempt from the control of their master, the faculty of locomotion and the power of making engagements for work, and receiving without accountability the proceeds thereof. The Court refused to charge as requested. But charged that a secret trust that in the slightest manner interfered with a master's right, will vitiate a will.

7th. That it is not a violation of any law of Georgia, for a testator to convey, by will, money or property to a slave or slaves. The Court refused to charge as requested.

8th. That if the jury believe from the evidence that testator by the sixth item of the will intended to convey the two hundred dollars therein mentioned to the slaves mentioned in third item of said will, that such a conveyance is not void, neither is Bell obliged by law, so to apply said money; there is only a strong moral obligation resting upon him so to do. The Court gave this charge as requested.

9th. That the undue influence necessary to vitiate a will, must amount to a destruction of the testator's free agency at the time of the execution of the will. The Court gave this charge as requested.

10th. That although undue influence may be proven at the time of executing the will; yet if the jury believe that the testator subsequently acknowledged and recognized said will as his own, such acknowledgment and recognition rebuts and annuls the former undue influence. The Court refused to give this in charge as requested.

11th. That secret trusts are not presumable, but must be distinctly proven. This charge the Court refused to give, and counsel for propounder excepted.

The jury found for the caveators, and against the will, and propounders moved for a new trial:

1st. Because the verdict was contrary to law.

2d. Because the verdict was contrary to the weight of evidence.

3d. Because the Court erred in saying in the presence of the jury, that the paper proposed to be set up as a will, "bore upon its face strong marks of suspicion."

4th. Because the Court erred in refusing to charge as requested by counsel for propounder in the 1st, 2d, 3d, 6th, 7th, 10th and 11th requests.

5th. Because the Court refused to give in charge, the 5th request of propounder, without a qualification, which was calculated to mislead the jury, and which was not called for by the request.

6th. Because the Court erred in charging the jury as requested by counsel for caveators.

7th. Because the Court refused, on motion of counsel for propounders, to dismiss the appeal, on the ground, there was no evidence that caveators were heirs at law of deceased, nor had they so described or represented themselves.

The Court refused to grant a new trial, and propounder excepted.

WRIGHT & DENNEY; and POLHILL & CAIN, for plaintiff in error.

SHEWMAKE, and W. & R. CARSWELL, *contra*.

By the Court.—BENNING J. delivering the opinion.

The first request of the propounder was, "that if the jury believe the testator might have seen the attestation of the will, it is sufficient; it is not necessary that he should actually have seen the attestation. The Court refused to give this charge, but said if the attestation be in the same room this is the law, otherwise it is not."

[1.] We think that the Court ought to have given this request in charge.

It was admitted, that the request was legal, if warranted by the evidence, but it was denied, that it was warranted by the evidence.

The evidence showed, that the testator was out of the room, at the time of the attestation. And his being out of the room, the propounder insists, raised a conclusive presumption, that the attestation was not in his presence; or if the presumption thus raised, was only a *prima facie* one, then he insists, that there was nothing in the evidence to rebut it, and therefore, that in either case, there was nothing to warrant the request. We agree that the testator's being out of the room, raised a presumption, that the attestation was not in his presence, but we cannot agree, that that presumption was a conclusive one; several cases have happened in which, the attestation was held good, although the testator was not in the room in which the attestation took place.

This presumption then, was one not conclusive, but subject to rebuttal. The propounder insists, that there was no evidence to rebut it.

Whether there were in proof, matters sufficient to rebut and destroy this presumption, we will not say; but we do think, that there were in proof, matters sufficient to raise the question with the jury, whether the presumption was not rebutted and destroyed. And if they were sufficient for this, they constituted evidence enough to warrant the request. It is needless to specify these matters. They are obvious.

There being then sufficient evidence to authorize the request, it was legal.

The request was in writing. And the new trial Act of 1854, requires a legal request if in writing to be given in its very words, and declares that if it is refused, a new trial must be granted by the Court refusing it, or by this Court on appeal to this Court.

We should have to grant a new trial, therefore, even if it were true, that the Court below had charged this request, in other words, as the counsel for the propounder, insist, that it is. And the Judge does, in his written opinion on the motion for a new trial, say, that he told the jury, that the attestation would be sufficient, if it occurred at a place at which, it might be seen by the testator. But he does not say, that he expressly withdrew, or varied, what he had said on refusing the request, which was, that the request was "the law," "if the attestation is in the same room."

The second request of the propounder is merely abstract.

His third request is in direct opposition to the statute, which says, that all wills "shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of no effect." *Pr. Dig.* 915. This provision is now extended to wills of personalty. *Acts of* 1851–'2, 104.

His sixth request is so imperfect, that we are not sure what it means.

[2.] His seventh request, we think, was properly refused. The law of Georgia makes a conveyance to a slave, void. Besides, such conveyance by the master, is perhaps, an implied manumission, and the Act of 1818, makes every sort of manumission illegal.

The qualification to his fifth request, is so obviously one required by the Act of 1818, that the exception to it, was hardly relied on in this Court.

[3.] His tenth request was an improper one, we think. A will made under undue influence, is absolutely void. And the recognition of a void will, does not render the will valid, unless the recognition is of a kind, that it of itself amounts to a will; as that it is in writing and properly attested, &c.

[4.] We are not aware of any law that says, that a trust cannot be proved by circumstantial evidence. It is about the only way, perhaps, in which a *secret* trust can be proved.

The Court then, we think, was right, in refusing the propounder's eleventh request.

The last ground in the motion, is a sweeping one, that "the Court erred in charging as requested by counsel for caveator."

The requests of the caveator were pretty much the counterpart of the requests of the propounder, Disposing of the latter, is therefore disposing of them.

It is very doubtful, whether the expression used by the Court, in the presence of the jury, does not bring the case within the Act which forbids the Judge to express or intimate his opinion, in the presence of the jury, as to what has, or has not, been proved. It is certainly safer, that such expressions be not used.

[5.] We think that the Court was right in refusing to dismiss the appeal. The propounder joined issue with the caveators, on the merits. That was an admission, at least *prima facie*, that the caveators were heirs, and entitled to litigate. And the most that he could ask for after that, would have been to be allowed to amend his joinder, by pleading that the caveators were not heirs. This he did not ask for, but merely moved to dismiss the appeal, because there was no evidence in, that the caveators were heirs. Why should the caveators have brought evidence to a point which was not contested, which indeed was conceded by the joinder of issue on the merits.

New trial granted.

James Newman, Sen'r, plaintiff in error, vs. The State of Georgia, defendant in error.

New trial granted because verdict contrary to evidence. When evidence is entirely circumstantial, it ought to connect the defendant with the criminal act.

Simple larceny, in Richmond Superior Court. Tried before Judge Holt, at November Term, 1858.

James Newman, Senior, and Wade Newman, were indicted for hog stealing. The defendants severed, and James Newman, Senior, was put upon his trial.

At the conclusion of the testimony, the case was argued before the jury, who brought in a verdict of guilty with a recommendation to mercy.

The defendant being dissatisfied with the verdict of the jury, moved the Court for a new trial, upon the following ground: "That the verdict of the jury was contrary to law and evidence and the charge of the Court," which motion the Court refused. To which refusal to grant a new trial the defendant excepted, and assigns the same for error.

Millers & Jackson, for plaintiff in error.

Attorney General McLaws, *contra.*

By the Court.—McDonald J. delivering the opinion.

The defendant was presented by the grand jury of Richmond county for the offence of simple larceny. Stealing hogs was the charge. He was tried and convicted. He moved for a new trial, on the ground that the verdict of the jury was contrary to law, evidence and the charge of the Court. The Court refused the motion and the defendant excepted. We are not disposed to interfere with the verdict of a jury in a criminal cause, especially when we have the evidence that the Judge who tried it, is satisfied with the verdict, which is to be implied from his refusing to grant a new trial. Nevertheless, if from a full consideration of the case we are decidedly of opinion that a conviction is not warranted by the evidence, it becomes our duty to interpose and order a new trial. The conviction in this case was entirely on circumstantial evidence. We have no doubt that the evidence establishes that the crime was committed by some one, but it is far from being free from doubt that it was committed by this plaintiff in error.

The hogs charged to have been stolen, must have been killed in the day time, for they were killed at least a mile from the owner's residence, and they were in the habit of going home to sleep at night, and it was by their failure to return home on Monday night, that the owner was led to believe that they had been stolen. The defendant's residence was five or six miles from that of the owner of the hogs. There is no evidence to connect the defendant with the killing of the hogs. There is no doubt but they were hauled from the place at which they were killed, in the cart of the defendant. The track of the cart was traced, the day after, from the place at which the hogs were killed, to a drain at the end of the lane of Newman, the defendant, by Martin, who owned the hogs, and a man by the name of Simmons. It was about one hundred yards to the house of defendant. On the next day, James D. Green followed the cart track from the end of the lane to the place at which, there is no doubt, the hogs were killed. He followed the track back into the defendant's lane. He also measured the horse's track, and found that it suited the foot of defendant's horse. He found another track which led into Mr. Newman's yard, between the time he had been there and his return. This track, I suppose the witness means, had been made during his absence. This is the only track that any of the witnesses traced into James Newman's yard. The track followed from the place where the hogs were killed was not followed into the lane, and it does not seem that it could not have been traced, if it had been driven through the lane to the house. What became of it does not appear. Whether it was driven through the woods, where its track could not be seen, is not stated; or whether it might have passed around; or whether it might have been driven into the woods and concealed, is all left to conjecture. The record shows no trace of the cart track into the defendant's yard, except the newly made one followed by the witness, Green, which was followed by him through the yard, to a house some distance off. This witness, after passing round the yard and riding the road beyond, put paper in the horse track, but does not say whether or not it corresponded with the measure previously taken. The track went into Henry Newman's gate, and turned and came back. On his return, he found the cart in James Newman's yard.

The defendant manifested great anxiety to settle the case, and paid Martin fifty dollars for the hogs. He all the time protested his innocence, saying the circumstances closely connected his family with it. It is true, his protestations of innocence were entitled to little weight, but that his family were implicated, if true, was quite a sufficient reason for the anxiety he manifested to settle the case, and his pertinacious efforts to settle it, after his having been repeatedly cautioned, are not, to our mind, evidence of guilt, but, on the contrary, they show great determination to settle a matter which, if prosecuted, might result in the conviction of a member or members of his family. These were all the circumstances which point to the guilt of this defendant. They are consistent with his perfect innocence. The horse and cart might have been used with or without his consent. If the latter, no blame could be imputed to him. If he loaned it without knowing the use to which it was to be applied, that cannot connect him with the transaction. The stolen property was not found on his premises; the track of the cart was not traced there, except as it passed through the yard to the house of another person. There is no evidence that it stopped near the door of his house, kitchen or smoke-house. Indeed, Mr. Martin seems to have been more desirous to get pay for his hogs, than to find an offender. Why did he not have this old man's premises searched? Why did he not enter the yard and enquire for the cart, when he could not trace its track beyond the drain of water at the end of the lane? He refused to take pay from the defendant at first, because he said he knew nothing about the law, and might do wrong; but when fifty dollars was offered, he accepted it. With all the circumstances before him, he never did accuse this defendant; and what the conviction of those was, who had the facts before them, may be inferred from the remark of Mr. Green, who was a disinterested witness. He told the defendant if he had any money to spare, he had better give it to his boys to move away, or defend a law suit.

But there was evidence on the part of the defendant. The witnesses were his children, who testified that he was at home the night the hogs were said to have been stolen. One of them names Tuesday night, which was a mistake as to the day. They say their father was at home that night, and went to bed between eight and nine o'clock, and was called up when Mr. Day came there, between nine and ten o'clock. Mr. Day was called on the part of the State, who deposed that it was between ten and eleven o'clock that he went to the house of defendant on that night. If defendant had gone to bed, he dressed very soon. He came out in a minute after he was called by the females. The same witness testifies it was five minutes from the first call to the appearance of the defendant. This witness corroborates the family witnesses in the important fact that the defendant was at home on that night, at a late hour.

Mr. Bealle, who was with Day, testifies that it was about five minutes from the call to the appearance of the defendant. If he had gone to bed, he had time to dress.

One of the daughters testifies that her father had been cutting a pine in an old field, as a reason why he went to bed so early. This shows he was at home and at work, at least a part of the day on which the hogs were killed.

We think that the evidence in this case establishes the facts that Martin's hogs were stolen and killed, and hauled away in the cart of the defendant, drawn by his horse, and that he showed great anxiety to have the case settled, but we think there is an absence of proof to connect him personally with the larceny. As we have said, his anxiety to settle the case can be accounted for on a hypothesis entirely consistent with his innocence. He had no part of the stolen property; the cart was not traced to his house; or, if it was, it passed through the yard directly to the house of another, whose gate it entered; it may have passed through his yard unknown to him, at night; he may have loaned the cart without a knowledge of the use to which it was to be appropriated, or it may have been taken without leave. If there had been a part of the property found on him; if he had been seen with the cart; if it had been driven to his yard and stopped, not passing beyond, we should not have felt authorized to interfere with the verdict of the jury; but believing as we do, that if he be guilty, the evidence adduced against him in this record, does not prove him so, we award him a new trial.

Juries are generally too reluctant to convict on circumstantial evidence. While it is true that a man ought not to be punished for an offence of which he is guiltless, the jury ought not to pronounce the accused innocent, for the want of positive evidence of his guilt. Circumstances satisfactorily proven, which point to his guilt, and which are irreconcilable with the hypothesis of his innocence, or which require explanation from him, and may be explained by him, if he be innocent, but which are not so explained, ought to satisfy the conscience of every juror, and justify him before that forum, for rendering a verdict according to their almost unerring indications. Any other rule will expose society to the ravages of the most depraved men. The most atrocious crimes are contrived in secret, and are perpetrated, generally, under circumstances which preclude the adduction of positive proof of the guilt of the persons who commit them. But it must be remembered, that while this is the case, circumstances which would authorize a bare *conjecture* of guilt, are not sufficient to warrant a conviction.

Judgment reversed.

Abner Sutton, plaintiff in error, vs. **Duncan McLoud**, defendant in error.

[1.] Copy grants are not admissible in evidence, until an excuse has been rendered for not producing the original grants, which excuse must consist, in a compliance with the rule of Court, or, with the rule of the common law.

[2.] A Sheriff's deed is admissible as color of title, even in the absence of the *fi. fa.*

Complaint for land, in Emanuel Superior Court. Tried before Judge Holt, at September Term, 1858.

This was complaint for the recovery of a tract of land in Emanuel county.

The plaintiff, Abner Sutton, on the trial, introduced in evidence a grant from the State of Georgia to John Kersey, for the land in controversy, issued and dated in 1845; then a deed of conveyance of the premises from Kersey to plaintiff; proved that defendant was in possession at the commencement of the suit, and closed.

Defendant, in reply, offered in evidence two copy grants from the State of Georgia to Isaac Perry, of the land in dispute, dated in 1795. Plaintiff objected to the admission of these copies until the originals had been accounted for. To lay a foundation for the introduction of the copy grants, defendant proved by his own oath, that he had never seen the originals; that he got his brother, Neel McLoud, to search for them. Then proved by Neel McLoud, that he had made search, and enquired of Joseph Perry, of Burke county, for them, who stated that he had had them, but had lost them, with many other land papers, and thinks he said, they were burnt, but referred him to Crawford Perry, who might know something about them; that on enquiry of Crawford, he did not have them, but referred him to A T. Lawson, who had had some connection with Perry's estate; on enquiring of Lawson he knew nothing of them.

Cross-Examined.—Said he did not know whether the Perrys, of whom the inquiries had been made, were of kin or related to Isaac Perry, but the land had been sold as the property of Jas. Perry, by the Sheriff of Emanuel county.

The copies offered were duly certified copy grants. The Court admitted in evidence the copy grants, and plaintiff excepted.

Plaintiff proved that the lands had been known as the Perry lands for sixty years, and that defendant had built a house, not on the premises in dispute, but on another part of the Perry lands, in the year 1851, and has continued there since.

Defendant then offered in evidence two deeds made by the Sheriff of Emanuel county to defendant, dated 3d day of August, 1847, which covered the premises in dispute, and sold under execution against James Perry.

To the introduction of these deeds plaintiff objected, unless the executions under which the land was sold were produced, and further, because defendant had not proven a possession of seven years, which was necessary in order to lay a foundation for the introduction of the deeds as color of title; and further, because the deeds showed that the land was sold as *Joseph Perry's.* The objection was overruled and the deeds received, and plaintiff excepted.

Defendant next offered a deed from the executors of one Attaway to Neel McLoud, dated 15th April, 1854, and a deed from Neel McLoud to defendant, dated 20th May, 1854, conveying the land in dispute as color of title. To the admission of these deeds in evidence plaintiff objected, because no possession by defendant had been proven, and that the will of Attaway ought to be produced, or a properly certified copy, to show that his executors had authority to make the sale, and because there was no conveyance proven from Perry to Attaway. The Court admitted the deeds, and plaintiff excepted.

Defendant then proved by E. Durden, that he, while Sheriff, sold the Perry land in 1847, to defendant, under executions against Joseph Perry, and delivered to him the deed as possession, but did not put him into possession, but authorized him to take possession; not long thereafter, saw him in possession. On cross-examination, said that he knew nothing about the time that he did go into possession.

After argument, the Judge charged the jury, that to recover in ejectment, plaintiff must show good title in himself; that the peaceable possession of a defendant can only be disturbed by such a title. In this case, the plaintiff having shown a grant from the State to Kersey, and a deed from Kersey to himself, his title is good, unless the jury find that the State had previously granted the land to another; in which event, the grant to Kersey was only good as color of title. But though the grant to Kersey should be void, as *title*, by reason of a former grant of the same land, yet if plaintiff and Kersey have been in possession seven years, under that grant, such possession would constitute a good title, though the grant itself be void as title, and under such possessory title plaintiff may recover.

He further charged, that the same rules and principles applied to defendant and his deed, as he had laid down in reference to plaintiff, and that the case mainly turned upon the question of possession, which was a question for them, the jury. To which charge plaintiff excepted.

The jury found for defendant, and plaintiff excepted, and assigns as error the several rulings, decisions and charges above excepted to.

W. B. GAULDEN, for plaintiff in error.

JNO. T. SHEWMAKE; and C. J. JENKINS, *contra.*

By the Court.—BENNING J. delivering the opinion.

Was the Court right in admitting the copy grants, in evidence.?

[1.] The copy grants being secondary evidence, were not admissible, until a proper excuse had been made, for not offering the original grants.

A proper excuse would have been, to show a compliance with the rule of Court, or with the rule of the common law, on the subject.

The rule of Court is, that "whenever a party wishes to introduce the copy of a grant, in evidence, the oath of the party, stating that the original is not in his power or possession, and that he knows not where it is, shall be sufficient foundation for the introduction of such copy." 2 *Kel.* 476.

This rule was not complied with. The defendant, though present in Court, and swearing to make out his excuse, would not, or, at least, did not, swear, that the originals were not in his power, and, that he did not know where they were. All he swore to was, that he had never seen the originals. His shortcoming in this respect, is calculated to make the impression, that the originals were in his power, or, that he knew where they were.

The rule of the common law, is, that secondary evidence of a writing, is not admissible, until diligent search in the proper places, has been made, without success, for the original.

The proper place to go to for these grants, was the place in which the grantor, Isaac Perry, kept his papers, and that place, of course, was to be found by calling on him, or, if he was dead, on his heirs, or personal representatives. The defendant did not call on any of these persons, so far as appears. His agent called on Joseph Perry, and Crawford Perry, and on A. J. Lawson. But the agent stated, that he he did not know, whether these persons were at all related to Isaac Perry or not. True, he says, that one of them, Joseph Perry, told him that he had once had the grants, but that they were lost, burnt as he thought. Yet this same Joseph Perry directed him to go further, and enquire of Crawford Perry; which shows, that Joseph Perry had his doubts, as to whether the grants were lost or destroyed, or not.

Couple this with the failure of the defendant himself, to say that the grants were not in his power, or that he did not know where they were, and the two things are quite well calculated to make the impression, that the grants were still in existence, and accessible to the defendant, on proper exertion.

This being so, we think, that, in order to make out a compliance with the rule of the common law, it would have been necessary to show, that application had been made to the grantee, or, if he was dead, to his heirs or legal representatives. This not having been shown, we think, that the rule of the common law, was not complied with.

Neither rule having been complied with, the evidence was improperly admitted. This is our conclusion.

[2.] We see no error in the admission of the deeds made by the Sheriff. They were offered merely as color of title. The absence of the *fi. fas.* might perhaps, justify remark to the jury, as to the *bona fides* of the purchase from the Sheriff, but it was not sufficient to authorize the exclusion of the deeds from the jury. Nor was it necessary, to make the deeds admissible, that it should appear, that the land had been sold, as the land of the grantee; or, that it should appear, that there had been seven years possession, under those deeds. All this is well settled.

The admission of the deed made by Attaway's executor, to Neal, was, as far as appears to us, erroneous. That deed was offered as color of title. It was made as late as 1854; and it was left unconnected with any older deed. Therefore, that it would make a color of title, beginning seven years before the commencement of the action, was impossible.

For *this* reason, we think, that this deed was improperly admitted, not, for the reasons relied on by the counsel for the plaintiff. Those reasons were the same, or of the same kind, as those relied on, for the motion to exclude the deeds made by the Sheriff, and these have been considered.

We see no fault in the first part of the charge—that relating to the plaintiff's title. It seems to be *favorable* to the plaintiff, but we are not quite satisfied, that there was evidence to justify a charge for the defendant, on the statute of limitations. The evidence going to show seven years possession in the defendant, previous to the action, was very slight. It is hard to say, that there was any.

New trial ordered.

THOMAS A. PARSONS and WIFE et al., plaintiffs in error, vs. JAMES V. JONES and HENRY W. JONES, trustees, defendants in error.

A testator appointed two of his sons, trustees of certain property including a number of negroes, for his daughter, a married woman, for her life, with remainder to her children. All of this property, except one old negro woman, the trustees turned over to the daughter and her husband, according to the trust. The old woman was almost worthless from age. Her relations belonged to one of the trustees, and he retained her, merely that she might be with them, doing so, however, against the wishes of the daughter and her husband, between whom and himself and the other trustees, there had grown up an estrangement amounting to social non-intercourse. The daughter and husband asked, by bill, that the trustees might be removed. The Court charged the jury that these causes were not sufficient to authorize an order of removal.

Held, That the charge was right.

In Equity, in Burke Superior Court. Tried before Judge HOLT, at October Term, 1858.

The bill in this case was filed by Thomas A. Parsons and his wife Malvina, and their two infant sons, Thomas Henry and James William Parsons, by their father, as next friend, against James V. Jones and Henry W. Jones, trustees of said Malvina and her children, the said infant complainants.

The object of the bill was to remove defendants from their trusteeship, created by the last will and testament of Henry P. Jones, deceased, and to have some other person appointed in their place.

The bill alleges, that, by the said will, and life estate, worth about eighty thousand dollars, was devised and bequeathed to said Malvina for her sole and separate use during her natural life, remainder in fee to her children, the said Thomas Henry and James William, and that defendants were, by said will, appointed trustees to hold said property for the benefit of *cestui que trusts*, which trusts they accepted and received from the executors of said will all the property and estate thus bequeathed.

The bill further states that during the lifetime of said testator, the most friendly relations existed between complainants and defendants, and which relations were well known to testator, and operated as a strong reason with him in selecting and appointing defendant's trustees of complainants. That soon after testator's death; defendants, without any good reason, commenced a series of aggressions upon the feelings of complainants, which has resulted in a cessation of all friendly intercourse between the parties, and this alienation was brought about by defendants, for the purpose of preventing complainants from understanding the condition of said trust estate in their hands, and from detecting the waste, mismanagement and destruction thereof, which the bill charges defendants contemplate committing, unless prevented by the interposition of a Court of Equity.

The bill further charges defendants with mismanaging the negroes belonging to said estate, making them idle, impudent and disobedient. That one of the trustees, James V. Jones, has removed from the county of Burke to the county of Fulton, and is inaccessible to complainants, and too far removed to supervise and protect said estate; and that said estate cannot be successfully managed while the present state of ill-feeling exists between the trustees and *cestui que trusts*. That the trustees have used no efforts to increase the property or funds under their control; that they have permitted money belonging to said estate to lie idle and useless in their hands, without putting the same out upon interest. That they refuse and neglect to cultivate the land or to repair the fences on the plantation.

The bill further charges that defendants own no property in fee simple, are irresponsible, and unfit to manage and protect the estate committed to them by the will of testator. The bill prays that defendants be removed, and that some fit and suitable person be appointed in their place.

The answer of defendants admitted the facts stated in the bill as to the death of Henry P. Jones and the provisions of his will creating a trust estate for his daughter and grandchildren, and their appointment as trustees. But they deny that there has been any waste or mismanagement of said estate, on their part, or that they have, ever contemplated or threatened to commit such waste. They deny that they have failed to cultivate the land, or have mismanaged the negroes; but allege that Thomas A. Parsons and wife are in possession of all said land and negroes, and the same are under their control and management, and that they are in receipt of all the rents and profits derived therefrom. They deny that they have failed to invest or loan out funds or money in their hands belonging to said estate. They admit that the relations between them and said Thomas A. Parsons are not of a friendly character, but they deny that such unfriendly relations have been brought about by them for any such purpose as the bill charges, and that they have done nothing to cause or give rise to any estrangement or alienation of good feeling. That towards Mrs. Parsons, their sister, they entertain feelings of sincere affection and devotion, and that they desire to manage and protect said trust estate solely for her and her husband's benefit and advantage, and that of their children, as required by the will of their father, and as he expected them to do.

All the property belonging to said trust estate is in the possession of complainants except one very old negro woman Lucy, who is very aged and infirm, and who, on account of her age and her relations, the defendant, Henry W. Jones, has kept on his place, and has not sent or placed her in possession of complainants.

That defendant, James V. Jones, resided in the county of Fulton at the time of testator's death, but since then he has removed back to Burke county.

After the testimony on both sides was closed, complainants requested the Court to charge the jury as follows:

If the jury find, from the evidence, the existence of such hostility between complainants and defendants as might, under circumstances liable to occur, embarrass the management of the trust property, it will be a cause sufficient to justify the removal of defendants from their trusteeship.

"If the jury find from the evidence that the defendants have done any act in violation of the interests or rights of the *cestui que trust*, whether it be retaining a servant they should have delivered, or any other act, that such a violation of the trust is a ground for removal;" which the Court refused to give; but did instruct the jury:

1st. That there was no incompatibility whatever between the offices of executor or trustee, held by defendants, under said will.

2d. That a jury should believe, before they removed a trustee, that the property was in danger of suffering a serious and irreparable injury by the continuance of said trustee in office. Trusts being peculiarly subject to the jurisdiction of Courts of Equity, such Courts will always exert their power for their protection, and will control the action of trustees as far as the interests of *cestui que trusts* demand; and if necessary, even remove them from their office. But the power of removal, especially from trustships created by will, is never exerted but in extreme cases, and to preserve the property itself from loss or destruction, or to secure its full and free enjoyment by those entitled to the use. The object of the bill before us is to remove the defendants from a trust created by the will of Henry P. Jones, and reposed in them. In looking into that will, it is seen that the complainant, Melvina, is not the only person having a beneficial interest in the trust from which the defendants are sought to be removed; she is but a life tenant, and the interests of those in remainder are to be regarded equally with hers. The disposition made by the testator of this portion of his estate is legal, and his will, in the settlement of it, should not be disturbed but for the most weighty reasons. The Court does not say that these trustees may not be removed at the suit of the life tenant alone; but it does say that before this can be done, there must be satisfactory proof of such conduct on the part of the defendants, as that the property itself is, therefrom, in danger of destruction or loss, or its full and free enjoyment by the life tenant withheld or hindered. Two causes for removal have been insisted upon.

First, the hostile feelings existing between the complainants and defendants. The Court instructs the jury that no misunderstanding between the parties, even though it amount to hostility, unless it lead the defendants to hostile acts, is sufficient cause for removal. Whether such acts have been proven, it is for the jury to determine. The second cause is the conduct of the defendants in regard to the slave, Lucy. As to this, the Court instructs the jury, that though this conduct should be found to be an interference with the rights of the complainants, yet it is not a sufficient cause for the extreme measure of removal. If the defendants have injured the complainant in regard to Lucy, this Court would, upon proper suit brought, give redress. But the complainants insist that the offices of executors of Henry P. Jones' will, and of trustees for complainant, Melvina, under that will, are incompatible. Such is not the opinion of the Court. In each character the defendants are answerable to the complainant, Melvina, who for this purpose may sue by her next friend, answerable as trustees in respect to the trust estate, as executors, together with their co-executors, in respect to the estate of Henry P. Jones. Under our peculiar system of equity jurisprudence, juries are the triers of of equity causes; and this case is submitted to your decision under the proofs you have heard, and the instructions upon matters of law now given you by the Court.

The above is, in substance and effect, the charge of the Court.

A. H. H. Dawson, for plaintiff in error.

C. J. Jenkins, *contra.*

By the Court.—Benning, J. delivering the opinion.

In this case, we think, that the opinion of the Court below was correct, and that opinion is so full, that it is needless, to add anything to it. Lucy, the woman withheld by the trustees, was so old as to be almost worthless. And the motive for withholding her, was manifestly one of mere humanity. Whatever her labor was worth, the defendants were able, and no doubt willing, to pay. Her retention then, could be no injury to the parties beneficially entitled to her. And if this would not content them, they might ask equity to compel the trustees to deliver her up. But, for the removal of the trustee, such a cause was not adequate.

Judgment affirmed.

Thomas L. Moore, plaintiff in error, vs. Thomas J. Morris, defendant in error.

[1.] An affidavit to a plea of *non est factum* that it is true to the best of defendant's "*remembrance,*" is insufficient to support it.

[2.] Witnesses are called to prove the execution of notes, who are illiterate, and who testify to the time and amount, and that authority was given by the defendant to persons to sign his name, held to be sufficient to admit the notes in evidence to the jury.

Assumpsit, in Emanuel Superior Court. Decision by Judge Holt, at September Term, 1858.

This was an action brought by Thomas L. Moore against Thomas J. Morris, upon seventeen promissory notes, each for thirty dollars. The following is a copy of each note, viz:

One day after date we or either of us promise to pay Thomas L. Moore, or bearer, thirty dollars for value received.

February 6th, 1856.

[Signed] WM. J. WILLIAMSON.
his
THOMAS J. ⋈ MORRIS.
mark.

The defendant pleaded that he did not make said notes, nor authorize any one to do so for him, which plea he verified by oath.

Plaintiff proved by Elijah Case, that in February, 1856, he was at the residence of plaintiff, when Williamson bought of him (plaintiff) some cattle, for which he agreed to pay five hundred and ten dollars, and the defendant, Morris, was present and agreed to become Williamson's security. That Williamson executed small notes for the amount, and Morris authorized both Moore and Williamson to sign his name to said notes as security. This witness further testified that he was illiterate and could not write, neither could Morris, and that he, witness, was not able to say whether the notes sued on were the notes given at the time above mentioned, or not, or that he had ever seen them.

Nelson Corley, examined by plaintiff, testified to the same facts. He was also illiterate, and could not read writing, and did not know the size of the notes.

Plaintiff, upon this proof, moved to introduce and read the notes to the jury. The presiding Judge refused to admit the notes in evidence. And to this decision counsel for plaintiff excepted.

A. H. H. Dawson; J. B. Prescott, for plaintiff in error.

Wilkins, *contra*.

By the Court.—McDonald, J. delivering the opinion.

[1:] The presiding Judge in the Court below refused to admit the notes in evidence on the trial, on the ground that the proof of their execution was not sufficient to overcome the plea of *not est factum*, which had been filed. The plea in this case was not sworn to be true, which is necessary in this State to throw the onus of proving the execution of an instrument sued on, on the plaintiff. The defendant swears that it is true to the best of his *remembrance.*

[2.] But had it been good, the evidence was sufficient to authorize the notes to be read to the jury. The persons present at their execution were illiterate, except Williamson, the principal. They testified that Williamson, in the month of February, 1856, purchased cattle of the plaintiff for the sum of five hundred and ten dollars, for which he gave small notes; that defendant, Morris, agreed to become his security and authorized the plaintiff and Williamson to sign his name, they could not say that the notes sued on were the same notes. The notes bear date on the 6th February, 1856, and are for the precise amount that Williamson agreed to pay for the cattle. The matter should have been referred to the jury as to the identity of the notes. But we do not consider the affidavit in support of the plea sufficient.

Judgment reversed

The City Council of Augusta, plaintiff in error, vs. The Georgia Railroad and Banking Company, defendant in error.

The City Council of Augusta, imposed a tax on the banking part of the capital of the Georgia Railroad and Banking Company, and a tax on the real estate of the company, situated in Augusta. The charter of the company, contains a provision in these words. "The stock of the said company and its branches, shall be exempt from taxation for and during the term of seven years, from and after the completion of the said Railroads or any of them; and after that, shall be subject to a tax, not exceeding one-half per cent. per annum, on the net proceeds of their investments."

Held, That the taxes were illegal.

In equity, in Richmond Superior Court. Decision by Judge Holt, at November Term, 1858.

This was a bill filed by the Georgia Railroad and Banking company, to enjoin and restrain the City Council of Augusta from enforcing and collecting certain tax executions, issued against complainant.

The bill alleges that complainant was incorporated a body politic and corporate, by an Act of the General Assembly of the State, passed 21st December, 1833, by the name of "The Georgia Railroad Company," with a provision or stipulation inserted in the Act of incorporation, that "*The stock of the said company and its branches, shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads or any of them; and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investment.*" The bill further alleges, that reposing with confidence in the provisions and stipulations in said Act, contained and especially in the favorable enactment as to taxation, a large number of persons proceeded to organize a company in accordance with the terms of said charter. The defendant in its answer, admits the organization of complainant, under said Act of incorporation, but deny all knowledge of the motives which influenced said persons in becoming members of said company and to make their subscriptions to the capital stock thereof, but that if said exemption entered into the consideration of the subscribers, it was a matter of minor importance, and that defendant, the City Council of Augusta, who was an original subscriber to the amount of two hundred thousand dollars, was actuated by no such consideration.

It was further alleged in the bill, and admitted in the answer, that by the Act of 18th December, 1835, an amendment of said charter was made by the General Assembly of Georgia and accepted by the stockholders of said company, and the stock subscribed and paid for in conformity with the provisions of said amendatory Act, and the terms thereof complied with. This Act changed the name of the company to that of the Georgia Railroad and Banking Company; increased the capital stock to two millions of dollars, authorized one half of said capital to be used for banking purposes, and not more, until the completion of the road to Athens, and one of the Southern branches through Greensborough; at which time any capital stock unemployed may be used for banking purposes; one-fourth of the stock applied to banking purposes to be paid in gold or silver coin. That it was provided and enacted " that the Act to which this is an amendment, shall be and remain in full force and effect in every section and clause thereof, except where it conflicts with the provisions of this (the amendatory) Act."

It was further alleged in the bill, that there was a further amendment of the charter, 25th December, 1847, authorizing the Georgia Railroad and Banking Company, to increase their capital to an amount not exceeding four millions of dollars, either by assessment on existing shares, by new subscriptions, or by issuing stock for the excess of the cost of the road over the (then) present capital, or by all of these means: with a proviso, that said amendatory Act, shall not authorize an increase of banking capital. Thus this amendment contained no provision repealing the exemption from taxation which was contained in the original Act; and that said amendment was accepted by the stockholders with this express understanding, which was acquiesced in by the State and its officers.

To these allegations defendant answered, that said Act contained no clause, expressly repealing the exemption from taxation, but denied that said amendment was accepted with any such understanding as alleged, or that such understanding was acquiesced in by the State or its officers.

It was admitted by counsel for complainant and for defendant, that the Act of 20th December, 1849, was not accepted by complainant as a part of its charter. The material parts of said Act are as follows:

An Act to amend the several Acts in relation to the Geoagia Railroad and Banking Company. Approved Dec. 20, 1849.

SECTION 1. *Be it enacted, &c.* That the Georgia Railroad and Banking Company shall be allowed to increase their capital to a sum not exceeding five millions of dollars, upon such terms, limitations and conditions as the stockholders thereof, in convention, shall determine: *Provided always,* That the banking capital of said company shall not be increased beyond the amount now authorized by their charter, namely, one million of dollars.

SEC. II. *And be it further enacted,* That the Georgia Railroad and Banking Company shall be, and they are hereby authorized to subscribe for and hold in the Nashville and Chattanooga Railroad Company of the State of Tennessee, stock to the amount of two hundred and fifty thousand dollars or any less amount upon the terms and restrictions contained in the charter of the said last mentioned company, or such other as may be agreed on.

SEC. III. *And be it further enacted,* That the power heretofore granted to the Georgia Railroad and Banking Company, of constructing a branch of their road to Washington, in the county of Wilkes, be and the same is hereby revived and authorized to be exercised by said company; *Provided,* That the amount of the increased stock of said company shall not be exempted from the taxation, as is secured to the present stock by the latter clause of the 15th section of the charter of said company, but shall be subject to such tax as the Legislature may hereafter impose.

It was alleged in the bill and admitted in the answer, that another Act, amendatory of complainant's charter, became a law on the 21st January, 1852, the material parts of which are as follows:

An Act to authorize the consolidation of the stocks of the Georgia Railroad and Banking Company and of the Washington Railroad or Plank Road Company, incorporated, February the fifth, eighteen hundred and fifty, and for other purposes. Approved January 21, 1852.

SEC. I. *Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same,* That the Georgia Railroad and Banking Company and the Washington Rail or Plank Road Company be authorized and empowered to consolidate their stocks, the said Georgia Railroad and Banking Company issuing stocks in their said company to the stockholders of the Washington Railroad or Plank Road Company, on terms of equality with the general stockholders in amount equal to the amount held by them respectively in the stock of the Washington Railroad or Plank Road Company, and that the two companies aforesaid, after the consolidation of their stocks, shall be known as one corporate body, under the name and style of the Georgia Railroad and Banking Company, and that said corporate body shall be authorized to exercise all the powers and privileges conferred by existing laws upon the Georgia Railroad and Banking Company, and be under all the liabilities and restrictions imposed on the same.

SEC. II. *And be it further enacted by the authority of the same,* That all laws and parts of laws militating against this Act, be and the same are hereby repealed.

It was alleged in the bill, that for "some years after the grant of said amendment, authorizing the exercise of banking privileges by your complainant, no specific amount was set apart for banking purposes, though the amount thus used was kept within the restriction of the law, but subsequently the board of direction of your orator placed a resolution upon their minutes, by which it was determined that not more than five hundred thousand dollars should be employed for such purposes, which direction of the board has never been changed; but the capital so employed is only this proportion of the whole capital stock, and is appropriated therefrom according as the exigencies and general business of the company render it convenient and desirable." These allegations of complainant's bill were admitted in defendant's answer with this additional statement, that said order or resolution of said directors was passed long prior to the year 1854.

It was admitted by counsel for the complainants and for the defendants that "A full tax of one-half of one per cent. on the net income of the company (the complainants) was paid by the complainants for each of the years 1854, 1855, 1856 and 1857, to the Treasurer of the State, and the tax, which the defendants propose to assess, would be an additional tax."

It was alleged in the bill that "The City Council of Augusta, a body politic and corporate, resident in said County and State, deriving authority from the Legislature of said State to make and enact all necessary ordinances, rules and regulations for the good government of the city of Augusta, in said County and State situated, and for the raising of revenue for the same (the said ordinances not being inconsistent with, or repugnant to the Constitution and Laws of said State) has pretended and does pretend that it is entitled to levy a tax upon the property of your orator, by virtue of its said authority, over and above or in addition to that which your orator has paid as aforesaid specified; and, in accordance with said pretence, has directed the Clerk of said Council to issue executions against your orator, the first of which has been issued ostensibly for 1854, upon an assessment of the banking capital of your orator, (as is pretended, that is to say, the sum of five hundred thousand dollars,) of one-half of one per cent, amounting in the whole to two thousand five hundred dollars, with damages of two hundred and fifty dollars and three dollars costs."

The bill sets forth three other executions of similar character, for the years 1855, 1856 and 1857, but for various sums amounting, in the aggregate, to the sum of fourteen thousand six hundred and eighty-five dollars, besides costs. It is also stated in the bill that said executions have been levied by the proper officer upon the banking house and lot of complainants in Augusta, and that said officer is proceeding to sell the same.

The bill further alleges that the City Council of Augusta and the officers thereof have not complied with the law and the ordinances of said City Council, under which they profess to act; that they have never demanded said tax in terms of said ordinances of said complainants, so as to authorize them to collect said tax, or damages thereon; that no such a return has been made, during the years for which said executions have been issued, by the Collector and Treasurer of said City Council, of the complainant as a defaulter in not paying such tax, as authorized the said City Council to issue said executions; that the said City Council has never taken action on any such return, directing the tax to be collected by execution; and that they never did, before the year 1857, give notice to complainants' officers of any intention to claim said tax.

To all these allegations the defendants, the City Council of Augusta, in their answer to said bill, say that they "admit that they are a municipal corporation, deriving their authority, and rightfully exercising the powers alleged; that the complainants own, in addition to the banking capital aforesaid, which is employed in the city of Augusta, a large amount of real estate and a great many slaves, of great value; that by the charter of these defendants, they are authorized and empowered to make and establish any and every "by-law or regulation that shall appear to them requisite and necessary for the security, welfare and convenience of the said city, or for preserving peace, order and good government within the same," and are also "vested with full power and authority to make such assessments on the inhabitants of Augusta, or those who hold taxable property within the same, for the safety, benefit, convenience and advantage of the said city, as shall appear to them expedient;" that the banking capital and real and personal property of complainants aforesaid, are used and employed in the city of Augusta and are taxable property; that complainants receive and enjoy all the advantages, protection and benefit, which are afforded by the police arrangement and other municipal regulations of the city of Augusta, and should pay their just proportion of the expense thereof; that, in the exercise of their legislative power, these defendants have assessed a tax upon the banking capital and real estate of complainants, lying in said city of Augusta, are now proceeding to levy and collect the same in the manner alleged by complainants, in strict conformity with the ordinances of said city; that the amounts of said tax executions are correctly stated, but that the first one alone is for tax upon banking capital only; the others being for tax upon banking capital and real estate.

These defendants, further answering, deny that they have not complied with prerequisites of law and of the ordinances of said City Council, under which they profess to act; deny that they have not made a proper and legal demand for said taxes of complainants, and insist and say that all legal and proper returns have been made, so as to authorize the issuing of said executions; and also insist and say that all proper and legal action has been had by said City Council to authorize said executions to proceed, and they deny that notice of an intention to claim said tax was not given to the officers of complainants before the year 1857.

They admit that complainants have made application to them and requested them to desist from the collection of said taxes, which requests these defendants have declined to comply with, insisting that they were and are in the exercise of a clear legal right. These defendants, further answering, say that on the first day of February, eighteen hundred and fifty, an Act of the General Assembly of said State was approved and became a law, which Act is entitled, "An Act supplementary to the general tax laws, and to tax certain property therein mentioned, which has been heretofore exempt from taxation;" that by the fifth section of said Act it was provided "That no banking capital employed by the Georgia Railroad and Banking Company, shall, by any construction of this Act, be exempt from future taxation at the discretion of the Legislature, and the tax on net profits shall only be on net profits of the railroad." These defendants insist that, if the exemption from taxation claimed by complainants existed down to the time when said last mentioned Act became a law, it was then finally repealed and revoked, and that the general city ordinance, passed on the twenty-fifth day of February, 1852, was of force and operated upon the complainants."

So much of said last mentioned Act as is material, is as follows:

An Act supplementary to the general tax laws, and to tax certain property, therein mentioned, which has been heretofore exempt from taxation. Approved February 1, 1850.

SECTION I. *Be it enacted, &c.* That the President of the Georgia Railroad shall, on or before the thirty-first day of December, 1850, pay into the Treasury of this State, as a tax for the year 1850, on oath, one-half of one per cent. on the net annual income of the stock of said road and its branches, under penalty of double tax for his refusal or neglect to do so, to be collected by execution to be issued by the Treasurer.

Sec. II. *And be it further enacted,* That the increase of capital of the Georgia Railroad and Banking Company, authorized by the Act of the present session of the General Assembly, be and the same is hereby taxed thirty-one and a quarter cents on every hundred dollars worth.

(Sections three and four relate to other railroad companies.

Sec. V. *And be it further enacted,* That each and every of the Presidents of the aforesaid railroad companies shall make like payments on the thirty-first day of December in each and every year hereafter until this Act shall be repealed; *Provided,* that no banking capital employed by the Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, shall by any construction of this Act, be exempt from future taxation at the discretion of the Legislature, and the tax on net profits shall only be on the net profits of the Railroad.

Upon the bill, answers and admissions hereinbefore stated, and the further admission (made for the purposes of that argument only) that "no return was made by complainant to the Clerk of Council as a tax payer in terms of the ordinance." No replication having been filled, and the cause not having been set down for trial, and not having been submitted to a jury, a motion was, by consent, made by complainant's counsel that an injunction issue, which motion was allowed by His Honor, the Judge, and an injunction ordered to issue to restrain the defendants from pressing said executions, to which decision and order the defendants, the City Council of Augusta, by their counsel, then excepted and now except, and assign error thereon, and tender this bill of exceptions within thirty days of the adjournment of said Court, (which occurred on the 3d day of December, 1858,) and pray that the same may be signed and certified according to law.

MILLERS & JACKSON, Attorneys for the City Council of Augusta.

HON. E. STARNES, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Did the City Council of Augusta have the power to tax, as they did, the banking capital of the Georgia Railroad and Banking Company, and the real estate of that company, lying in Augusta? If the Council had, it is clear, that the granting of the injunction to prevent the collection of the tax was improper.

The Council, it is obvious, did not have this power, if it was a power, the exercise of which, would come in conflict with the charter of the company. And the company insists, that the exercise of such a power, would come in conflict with a part of their charter, viz: this part: "The stock of the said company and branches, shall be exempt from taxation, for and during the term of seven years, from and after the completion of the said Railroads, or any of them; and, after that, shall be subject to a tax, not exceeding one-half per cent. on the net proceeds their investments." (15 *section of char.*) . Is the company right in this? That, of course, depends on what this part of the charter means.

1st. And we think that it means, first, that the stock of the company, was to be subject to a tax, but not, to any tax exceeding one-half of one per cent. on the net proceeds of its investments.

Such, we think, the natural import of the words; and words, even in the charter of a corporation conferring valuable franchises, are commonly to be taken according to their natural import.

It must be true, that the Legislature intended to restrict the taxing power, or, that it did not. If it be the former that is true, the words, "shall be subject to a tax not exceeding one-half per cent on the net proceeds of its investments," were useful; if it be the latter that is true, those words are useless, and worse than useless; useless, because in the absence of all words, the taxing power would have stood unrestricted, it requiring words to restrict that power; worse than useless, because the words are at least of a character, to raise a strong doubt, whether the Legislature did not intend to restrict the taxing power. This being so, can it be that the Legislature would have used any words, at least, can it be, that the legislature would have used such words as these, if it had not been its intention to restrict the taxing power?

The Legislature interprets the words as giving this exemption.

In the Act of 1849, amendatory of the Acts, relating to the company, there is this proviso; "that the amount of the increased stock of said company, shall not be exempted from the taxation, as is secured to the present stock, by the latter clause of the 15th section of the charter of said company, but shall be subject to such tax as the Legislature may hereafter impose."

In 1850, there was passed another Act which had this title; "An Act supplementary to the general tax laws, and to tax certain property therein mentioned, which has been heretofore exempt from taxation."

This Act also, had this proviso; "that no banking capital employed by the Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, shall by any construction of this Act, be exempt from future taxation at the discretion of the Legislature, and the tax on net profits shall only be on the net profits of the Railroad."

2d. We think, that this part of the charter means, secondly, that the stock of the company, as stock; as a unit; is alone what is to be subject to the tax; not parts of the stock as the part used in banking, nor the particulars in which the stock consists; as, the land, cars, rails, &c.

The words seem to require this meaning: "The *stock*" "shall be subject to a tax." So, certainly, do several obvious considerations of convenience. And stock, as stock, is that on which, the State tax is, always, I believe, levied; so there is analogy too.

3d. We think, that this part of the charter, means, thirdly, that this tax to which, the stock is to be subject, is to be a tax to be laid by the *State;* not a tax to be laid by a municipal corporation, unless there has been granted to such corporation, a special power to lay the tax instead of the State.

Stock either, as being an abstraction, has no locality; or it has the locality of its owner; or it has the locality of the particulars of which it consists; or it has the locality of the business it begets; and whichever of these things it be that is true, it cannot be, that Augusta is the locality—the residence, so to speak, of the stock of this company; as well may it be that Atlanta, or any of the intermediate points are.

The taxing power of the City Council of Augusta, is, a "power and authority to make such assessments on the inhabitants of Augusta, or those who hold taxable property within the same;" "as shall appear to them expedient." This is a power confined to "inhabitants," or, to property "within the city." Therefore, it cannot extend to this stock, as, it cannot be said, that this stock is "within" the city.

What is thus true of Augusta, is, doubtless, true of Atlanta, and of the intermediate places.

If then the power is one not to be exercised by any of these municipal corporations, for this defect of locality or residence, it follows, that it must be a power, to be exercised by the State alone.

Could anything else have been the intention?

If it was the intention, that this was to be a power to be exercised by Augusta, so, equally, must it have been the intention that it was to be a power to be exercised by Atlanta, and the intermediate points. It is not a supposable case, that the intention was, that the power was to be one to be exercised to the *full*, by each, and all of these corporations. It is little less supposable, that the intention was, that it was to be a power to be exercised by them, in separate shares, for there was nothing said or done, by which, to ascertain the shares. There was no apportionment of the power. It is fair to conclude, therefore, that the intention was that the power to impose this tax was to be a power to be exercised by the State alone.

And there are reasons why the power ought to be lodged with the State, exclusively. These will readily occur.

We think, then, that the charter means these three things.

Stock it is, in reference to which, the charter means these things. "The stock of the company" "shall be subject," &c.

Is the banking part of the stock, included in this expression, "the stock of the company?" We think so. That part is stock, and stock of the company. The use to which it is put, cannot deprive it of its quality of stock, and stock of the company. Besides, it appears from the bill, that there is no particular portion of the stock, set apart and separated from the rest, permanently, to bank on, but that the banking is done on such part, as, at the time when stock is needed for banking, may be in hand in the form suited to banking.

This too, is the legislative interpretation, as will be seen by referring to what I have already quoted from the Act of 1850, and, I may say, what I have quoted from the Act of 1849.

We think, then, that the stock employed in banking, is to be considered as included in the expression, "the stock of the company," and therefore, that it, also, is entitled to the exemption.

It was argued, that if this was so at first, yet that it had been changed by the part of the Act of 1850, which I have quoted. But we do not think so. That Act does not at all tax the banking portion of the stock, does not even declare it subject to a tax of any sort, it merely says, that no *construction* shall be put on itself, by which, *it* shall be made, to exempt that portion of the stock from taxation at the discretion of the Legislature.

It was also argued, that the Legislature had the power to disregard this exemption, and to tax the stock at discretion. It will be time enough to determine that question, when the Legislature imposes, or authorizes to be imposed, a tax exceeding that provided for by the charter. It had done nothing of the sort, when the taxes in question were laid by the City Council.

These being our views, it is plain, that they must lead us to the conclusion, that the taxes imposed by the Council, *were* in conflict with the charter; in conflict with each of the three meanings which we found in the charter. It is needless, to take time, to state the points, of conflict, as these must be apparent.

Consequently, we think, that the taxes were illegal, and therefore, that the Judge was right in enjoining their collection.

Judgment affirmed.

THE STATE, *ex relatione*, ROBERT W. HABERSHAM, and others, plaintiffs in error, vs. THE SAVANNAH AND OGECHEE CANAL COMPANY, defendant in error.

[1.] The use of a road by the public for thirty years and indefinitely more, by the public, is sufficient to authorize a jury, to presume a grant to the public.

[2.] If even a private road be obstructed by a canal, the owner of the road, has the right to require the makers of the canal, to bridge the canal so as to restore the means of passage; and—

[3.] Mandamus is the proper remedy.

Mandamus, in Chatham Superior Court. Decision by Judge FLEMING, at December Term, 1858.

Robert W. Habersham and Mary Telfair, trustees of William B. Hodgson and wife, and the said Mary Telfair in her own right, and others, applied to the Superior Court of Chatham county for a mandamus, to compel the Savannah and Ogechee Canal Company, to construct a bridge over said canal, at its intersection with the Sabine fields road. A *rule nisi* was granted, requiring said company to show cause, why the *mandamus* should not issue.

The Canal Company filed their answer, setting forth certain causes why said *mandamus* should not issue; and the relators having traversed said answer, the case came on to be tried; and after the testimony on the part of relators had closed, respondents moved for a nonsuit, and to dismiss said rule, which motion the presiding Judge refused; and after respondent had introduced testimony, the case was submitted to the jury, and the following verdict rendered: "We find the answer of respondent to be false, and that a peremptory *mandamus* issue." Whereupon, the Savannah and Ogechee Canal Company moved for a new trial upon the following grounds:

1st. Because his Honor the Judge erred in refusing the motion to dismiss the rule, made upon the following grounds: That the road over which the bridge is asked to be built is not a public road; because it is not the duty of the Savannah and Ogechee Canal Company to build bridges over any other than public roads; because the writ of *mandamus* is not the proper remedy; because the relators were barred by laches.

2d. Because his Honor the Judge erred in deciding that the Savannah and Ogechee Canal Company were bound to build bridges over all public roads intersected by the canal.

3d. Because his Honor the Judge erred in deciding that *mandamus* was the proper remedy.

4th. Because his Honor the Judge erred in deciding that the Savannah and Ogechee Canal Company were bound to build bridges over all private roads intersected by the canal.

5th. Because the verdict of the jury is contrary to the charge of the Court, in this, to-wit: Because the Court charged the jury that when the statute commenced to run, it never ceased, and that the statute commenced to run from the time the respondents refused to build the bridge. Because his Honor the Judge charged the jury that the time which would bar an action at law would bar the right of *mandamus*.

6th. Because the verdict of the jury was contrary to evidence, in this, to-wit: Because the evidence proved that more than seven years had elapsed, since the right, if any ever existed, obtained for the relators to compel the erection of said bridge, before they had asserted the same. Because the evidence proved that the relators were barred by the time which had elapsed, from the time when the demand was made by them, for the building of the bridge, and the refusal, neglect and failure so to do by the respondents.

7th. Because the finding and verdict of the jury was contrary to law.

8th. Because the verdict and finding of the jury was contrary to evidence.

Brief of Testimony.

1st. The title of the relators to the Sabine fields plantation admitted.

2d. *Robert Habersham*, sworn, on the direct examination, says: He has known Sabine fields road for fifty years; after passing Sabine fields, it passes plantations beyond; has traveled it, and has known others to have traveled it without question; knows a bridge was put there across the canal, after the canal was cut; does not know by whom the bridge was built; has passed the canal when it had no water in it; continued without water for some time; knew Mr. Hodgson to apply to the elder Mr. Scudder to build a bridge there often, after water had been put back in the canal; thinks that banks of canal were cut so as to make sloping drive cut through, in A. D., 1855.

Cross-Examined.—Has driven through the Sabine fields road to the Dean forest road; has never been able to find any other way to the Sabine fields; there is a small tract between Sabine fields tract and the canal.

Direct resumed.—Right to travel beyond Sabine fields never denied; there are several settlements beyond Sabine fields; persons beyond Sabine fields have been coming fifty years to Savannah, to vote, &c., by the Sabine fields road; does not extend beyond Middleton's place.

James Hunter, sworn: Has known Sabine fields road for fifty-five or sixty years; it was not a public road worked by public hands; stages used to pass it, I understand; several places beyond Sabine fields; it is several miles from Sabine fields to Middleton's; used to hunt there with Mr. Telfair; Mr. Telfair claimed it as his private road; witness told Mr. Telfair if any person was injured by the falling of the bridge over the canal, he might make him (Mr. Telfair) responsible; Mr. Telfair said the canal was bound to keep up the bridge; witness said, suppose the Canal Company do not? Mr. Telfair said, he had given them the right of way upon condition that they would build and keep up the bridge; that if they did not do it, he would take away the right of way and stop up the canal.

J. F. Brantley, sworn: Knows the Sabine fields road: Jenckes owned the land on this side of the canal; Sabine fields on the other; Neidlinger, Baker, Cubbedge and others live on the road this side of Middleton's, and travel the Sabine fields road; has known the road since A. D. 1854; It has been traveled freely by persons wishing to do so; in crossing before bridge was put there, the water was sometimes shallow, sometimes deep—going into a buggy; had a talk with Scudder about crossing the canal; no other way to get produce to market from Sabine fields and other places.

Cross-Examined.—There was a road across the canal, this side the Sabine fields road; now stopped up by Mr. Hodgson.

Direct Resumed.—It is a common wagon road, not fit for traveling in a buggy.

A. J. C. Shaw, sworn: Knew Sabine fields road in A. D., 1795; has traveled it in carriage, on horseback, and on foot; Canal Company put the bridge there; there has been no obstruction on the road up to Middleton's for thirty-four years; knows, or knew Isodure Stouff as county Surveyor; has never known any other good road to Sabine fields and the outer settlements; the other road was a cart road; the road was always where bridge is; could cross the road until water was put in the canal.

Daniel H. Stewart, sworn: Knows the bridge near the brick-yard; leads to the Springfield lots; has traveled the road to the Sabine fields; knew a bridge there, near brick-yard, long ago.

John Scudder, sworn: The Canal Company refused to build the bridge.

James A. Baker, sworn: Has known Sabine fields road since A. D., 1853; knows no other good road for persons going to lands on Sabine fields road; banks of canal were cut so as to allow passage of vehicles, about midde of A. D., 1855, before access was stopped up.

After motion was made by respondent's counsel to dismiss the rule, and motion overruled by the Court, respondents introduced minutes of corporation, which had been produced under notice from relators, and examined by them, and read the following extracts from the minutes:

1. January 21, 1829.—The proposal of William McGre-

gor and John Murphy, to complete the bridge at Mr. Telfair's road, and the culvert in Raspberry swamp, for the sum of $450, was laid over for further consideration.

2. February 11, 1829.—The proposal of McGregor and Murphy, for building bridges, culvert, &c., for the sum of $450, was accepted, and referred to the contract committee for their report thereon as to the responsibility of the contractors to finish the work.

3. May 22, 1838.—A communication from R. Habersham, in behalf of the Misses Telfair, requesting a bridge over the canal contiguous to the plantation, to be built by the company, or permission to have a road adjacent to the canal and parallel with it, so as to enable them to use bridge lower down, was read.

Resolved, That permission be granted to the Misses Telfair to have a road adjacent to the canal and parallel with it, as requested in Mr. Habersham's letter, and that the Secretary do so inform him.

Motte Middleton, sworn on behalf of respondents, says: He knows Sabine fields road, crossed by the canal; there is another road running parallel with the canal, and crossing the bridge lower down; the lower bridge is a good bridge, better than any he has ever seen on the old Sabine fields road; he has not traveled the road crossing at lower bridge for three years; previous to that time he had been traveling it for a number of years; for a light buggy he preferred it to the old Sabine fields road; the old Sabine fields road was the best for loaded wagons; with very little work the other road might have been made equally good for wagons.

Robert Habersham, recalled by respondents, says: He has been the agent of the Misses Telfair for many years, but seldom went to their plantations; has been so since the death of Mr. Telfair, which, he thinks, occurred in 1832; knows that, as agent of the Misses Telfair, he frequently made application to the Canal Company to build bridge across canal on Sabine fields road, about which there were constant disputes after the old bridge fell into decay; cannot say whether applications were made before or after canal was disused; the fact that the canal was not used, and no water in canal, did not prevent applications for a bridge there, so far as the witness recollected; minutes of Canal Company exhibited to him; says he has no recollection of the parallel road; in making the application he acted as the agent of the Telfairs; does not know that the application referred to in the minutes related to a bridge across the canal on the Sabine fields road; does not recollect that a bridge was required by the Telfairs at any other point; has no recollection that the resolution of the Canal Company in 1838, as appears by the minutes produced in evidence, were ever brought to his notice.

The Court below refused the motion for a new trial, and respondent excepted.

Ward, Jackson & Jones, for plaintiff in error.

Harden & Lawton, *contra.*

By the Court.—Benning, J. delivering the opinion.

The first question is, was the Court below right, in overruling the motion for a nonsuit?

That the Court was, if the evidence was such that it might authorize the jury to find, that it was the duty of the Canal Company to build the bridge; and if *mandamus* was the remedy, is clear.

The road was either a public road, or, a private road.

If it was a public road, it was clearly the duty of the company, to build the bridge—a duty imposed by the Act of 1833, amendatory of its charter, which Act says; "That whenever the said canal shall intersect a public road, the said corporation shall be bound to build a safe and suitable bridge."

[1.] And there was evidence sufficient to authorize the jury to conclude, that the road was a public road. There was evidence to prove, that it was in use as a public road, in 1795, and, that it continued so, down to the time of the digging of the canal, which was about 1830. How long before 1795, it had been so in use, does not appear. From a public use so long continued as this, the jury would be at liberty to infer a grant of the use to the public. *Williams vs. Turner*, 7 *Ga.* 348.

There was evidence, then, which would authorize the jury to find, that the road was a public road; and therefore, which would authorize them to find, that it was the duty of the company to build the bridge.

If the road was a private one, it was the duty of the company to build the bridge, provided, 1st, they agreed to do it; or 2dly, the law was that they must do so, agreement or no agreement, unless they had, by something, obtained an exemption from the duty—as, by a release, or the statute of limitations.

There *was* evidence from which, the jury would be authorized to infer such an agreement.

Mr. Hunter swears, that Mr. Telfair told, that he had given to the company, "the right of way upon condition that they would build and keep up the bridge." This evidence was in, and therefore, to credit it was the right of the jury.

The company did build and keep up the bridge, in Mr. Telfair's lifetime.

Frequent applications were made to them, by the successors to Mr. Telfair's rights, to build the bridge, and it does not appear that the company in reply to these applications, took the ground, that if they were under obligation to build the bridge, they were under none to them to do it. On the contrary, it appears, that the company conceded to the Telfairs, the right to have a road parallel to the canal. Would they have done this, unless there was some agreement or understanding by which, they were under a duty peculiar to the Telfairs.

There was, then, evidence from which, the jury might have inferred an agreement to build the bridge.

Was there any evidence of the existence of any thing by which, they had obtained a discharge from this agreement?

There was no evidence to show, that any proceeding under the 12th section of the charter, had taken place; that section which provides a mode by which, the company might obtain the "lands," &c., which they might need. And even if this were not so, it can hardly be true, perhaps, that that section applies to the case of mere easements, such as is the right to use a road.

True there was proof of an application on behalf of the Misses Telfair, to the company, to build a bridge, or for "permission to have a road adjacent to the canal, and parallel with it, so as to enable them to use the bridge lower down;" and, proof, that permission to have such a road, was given, and that such a road was opened and used, till the canal went dry.

But 1st, the jury would be at liberty to conclude, that it would be a straining of these facts, to make them amount to a release on the part of the Telfairs, of their right to a bridge; and, to a conveyance on the part of the company, of their right to the use of the land, covered by this road; when it might as well be that no more was meant by the facts, than to make the parties, respectively, tenants at will of each other.

2dly, conceding, that these facts do amount to such a release of the right to a bridge, yet the evidence shows, that the canal went dry—went into "disuse," in 1838, or thereabouts; and, that, thereupon, the old use of the road over the bed of the canal, was resumed by the Telfairs and the public; and, that this resumed use, continued until 1855, and for most of the time, with the bed of the canal dry.

Now when a road or other way, is abandoned, the right of way, returns to the owner of the fee.

At least, it does, if the owner of the fee, has used the land, for seven years and upwards, as his own.

Indeed, the use of the land for a road, by any one for seven years and upwards, would, according to the case aforesaid, in 7 *Ga.*, give him the right so to use it.

The evidence, then, about this affair of the road that was to run parallel with the canal, is not such that it would require the jury, to say, that it discharged the company from their agreement to build the bridge, supposing there was such an agreement.

It is also true, that the company further rely on the statute of limitations, as giving them an exemption from such agreement, if an agreement existed.

Then was the evidence such as to require the jury to believe, that the company had had adverse possession of the part of the road cut by the canal, to the stoppage of travel on that part? The evidence was, the reverse. It was, that, at first, the company put up a bridge; that the bridge stood till about 1838; and that about that time, the canal went into disuse, and became dry, and the bridge fell down or was removed and the use of the old road across the canal-bed, was resumed by the Telfairs and the public; and, that this use of the road, continued until 1855, most of the time, with the bed of the canal dry; and, that in 1855, the slopes to the banks, were filled up, and thus, the road rendered impassable.

Now, during the time of the bridge, there was no such adverse possession of the road to the obstruction of travel, for during that time, the bridge itself served in place of the part of the road over which it stood—the bridge itself was indeed to be considered, as that part of the road. At all events, the bridge was an admission of the duty to build a bridge, and so it could not be evidence of the assertion of a right adverse to that duty. And, during the subsequent time, fifteen or eighteen years, there was no exclusive possession of any sort in the company, but the possession was in the Telfairs and the public, for they used the canal-bed corresponding to the place of the old road, as a road, in the same way in which, they had used the old road, before the making of the canal.

According to the evidence, then, the adverse possession was, if any thing, the other way. The Telfairs and the public were holding adversely for fifteen or eighteen years, for a period running up to within a year or two of the commencement of the present suit.

It turns out, then, that there is, in the evidence, nothing which would have required the jury to believe that any matter existed, to give the company a discharge from their agreement with Mr. Telfair, supposing, the jury should conclude, as they might from the evidence, that such an agreement existed.

Then the evidence was such, that it would have authorized the jury to conclude, that it was the duty of the company, under an agreement, to build the bridge.

3dly. But even if there was not any evidence of such an agreement, yet if the law itself was, that the company must build a bridge, though the road might be only private, it was their duty to build the bridge, unless there was something to exempt them from the duty.

[2.] It *was* the law, that they must build a bridge, if their canal was such as to obstruct the road, and prevent its use as a road, and the Telfairs had the right to use the road.

Such an obstruction is a nuisance. "If I have a way annexed to my estate across another's land and he obstructs me in the use of it, either by totally stopping it or putting logs across it, or ploughing over it, it is a nuisance." 3 *Black.* 218.

The canal, after the slopes in its banks at the road, had been filled up, did become an obstruction to the road.

The evidence was such as to authorize the jury to find, that the relators did have the right to use the road; for it was such as to authorize the jury to find, that the whole public had this right. It showed the road to have been in public use for some thirty years and an indefinite time previously.

But if they had the right to use the road, then it was the duty of the company, not to obstruct the road and thus prevent that use, but, to leave the road as it was, or if not, to put something as a substitute for the part they appropriated. And a bridge is the only thing that would at all answer for such substitute, and even it would not be equal to that which it would take the place of—the solid earth.

There was nothing in the evidence, to excuse the company from the performance of this duty thus imposed by the law. The license for the road parallel to the canal, the plea of the statute of limitations, were no more sufficient, to excuse them from this duty imposed by the law, than they were found to be, to excuse them from the duty imposed by the agreement with Mr. Telfair, if there was an agreement with him.

Thus then, it appears, that there was evidence sufficient to authorize the jury to believe, that the road was a public road; in which case, the charter itself makes it the duty of the company, to build a bridge—and, evidence sufficient, if it was a private road, to authorize them to find, 1st, that there was an agreement by which, it became their duty to build the bridge; and 2dly, that, even without an agreement, the law itself imposed the duty on them to build the bridge.

There was then, a plenty of evidence to authorize the jury to believe, that this duty existed.

And this brings us to the question, supposing the duty to have existed, was mandamus the remedy.

[3.] We think it was the remedy.

1st. No other remedy is adequate. Damages might, perhaps, do for the past, but they are not adapted to the future. The obstruction will still remain. Really, however, the injury is manifestly, of a kind which it is impossible to measure, with any approach to certainty, by damages. And when there is no other adequate remedy, mandamus lies.

2dly. Mandamus has been actually employed for abating nuisances. *Tapping on Mand.* 171.

It appears then, that both of the things assumed hypothetically at the outset, existed—it appears, first, that the evidence *was* such, that it might authorize the jury to find, that it was the duty of the company, to build the bridge; and secondly, that mandamus *was* the remedy. It follows, that the case was one, in which it would have been wrong, to grant a nonsuit.

This disposes of the first exception, which was, to the refusal of the Court to grant a nonsuit. The next and only other exception was to the refusal of the Court, to grant the motion for a new trial.

All the grounds of that motion, but two, are involved in the motion for a nonsuit; and consequently they have been disposed of, in the disposition made of that motion. Of the two, one is, that the jury found against a part of the charge of the Court, the part which told them, that when the statute of limitations began to run, it never ceased to run; and that it began to run from the time, respondents refused to build the bridge. The Court itself became satisfied that this charge was wrong, and so said in refusing this motion.

And we think it was wrong, as must appear from what has been already said.

The refusal referred to was made, probably, at a time when there was a passage way across the bed of the canal; and that, and not an intent to claim adversely, may have been the reason of the refusal.

3dly. But if this is not so, yet the use of the road over the canal-bed, by the Telfairs and the public, for fifteen or twenty years, would, not only stop the running of the statute in favor of the company, but would set it to running against them.

There is nothing then in this ground.

The other is, that the jury found the return to the *rule nisi*, "false," although, there were some things in that return, that were not false.

The late statute requires the verdict to be in this form. And its meaning, doubtless, must be, that if the material parts of the return are false, i. e., the parts material to the defence, then the verdict must be, "false" generally, although there may be some things in the return that are not false. Any other meaning would render the statute not only absurd, but impracticable. There will probably never be a return in which every thing will be false.

We think, then, that there is no merit in the exception to the refusal to grant a new trial, and therefore we affirm both of the judgments excepted to.

Judgment affirmed.

ALVIN N. MILLER, and others, plaintiffs in error, vs. THE SAVANNAH FIRE COMPANY, defendant in error.

The members of the fire company of Savannah, all resigned, and in their places, the City Council appointed new members.

Held, That the City Council had the power to make the appointment.

In Equity, in Chatham Superior Court. Decision by Judge FLEMING, at December Term, 1858.

This was a bill filed by "The Savannah Fire Company," assuming to be a body corporate, against Alvin N. Miller, Gilbert Butler, and others.

The bill alleges that complainant was incorporated by an Act of the General Assembly of the State of Georgia, passed in December, 1834, and authorized to hold real and personal estate; and that the interest or income arising therefrom, should be applied to relieve the distresses of the members, &c

That on the 4th November, 1853, the said Savannah Fire Company was composed of Alvin N. Miller, and his co-defendants named in the bill. That at that time, said company owned a fund of about seven thousand dollars. That about said day, Miller and his co-defendants tendered their resignation, as members of said company, to the City Council of Savannah, which was accepted.

That after this resignation was accepted, certain persons named in the bill, were appointed members of said company, and were duly organized.

That said Miller and his associates, the defendants, notwithstanding their resignation, have retained possession of the said funds of said Savannah Fire Company, which they had in their hands at the time of their resignation, and which the bill alleges, belong to complainant, said Fire Company; and that it has no means of ascertaining the amount of said sum, or in what manner it has been disposed of by defendants That complainant has applied to defendants to come to a settlement, and to account for said funds, and to pay over the same, which defendants refuse to do. The bill prays for an account, &c.

To this bill defendants filed their plea in bar, denying that complainant is a body corporate. They state that defendants, about 4th November, 1853, were the duly appointed successors of the corporation styled the Savannah Fire Company, and that thus constituting said corporation, they have not appointed any successors or corporators; and that said corporation could transmit and continue its franchise only by its own voluntary action, and appointment of successors and corporators. That said corporation was dissolved by the voluntary act and assent of all its members, (without having made any election or appointment of their successors,) by the resignation of their offices, and by a surrender to the State of all its franchises; and that there is not any corporation existing under the charter aforesaid. That the persons who now style themselves the Savannah Fire Company, are not the successors of the corporation, but an unincorporated association under that name, created by the City Council of Savannah, and were formed since the dissolution of said corporation, for certain municipal purposes, and have no rights, powers or franchises, under and by virtue of the Act of December, 1834.

The cause was heard by Judge FLEMING, who, after argument, overruled the plea, and ordered defendants to answer. To which decision and judgment defendants except.

LAW, BARTOW & LOVEL, for plaintiffs in error.

WARD & OWENS; and GORDON, *contra*.

By the Court.—BENNING J. delivering the opinion.

The members of the fire company all resigned, and in their places, the City Council appointed new members. If the Council had power to make this appointment, the plea was insufficient, and the decision holding it insufficient was right. This is clear.

The question, therefore, is, did the Council have the power to make this appointment?

Whatever power the Council had on the subject was derived from the Act of 1834, "to incorporate the Fire Company of the City of Savannah," the third section of which Act is in these words: "That said corporation shall elect their officers in the manner pointed out in the ordinances of the City Council of Savannah, and that nothing in this Act shall be so construed as to make said fire company, independent of the City Council, but that it shall continue to be subject to the same control of the City Council as that body has heretofore exercised over it." *Pamph.* 1834, 131.

These words must mean, either, 1st, that the power which the Council was to have over the fire company, after its incorporation, was to be the power which the Council had actually "*exercised*" over the company, before its incorporation; or 2dly, that the power was to be the power which the Council had *possessed* over the company, before its incorporation, whether the power had ever been exercised or not.

Supposing the first, the meaning, the question will be, what power had the Council actually "*exercised*" over the company, before its incorporation? or, to speak more definitely, the question will be, whether the Council had ever *exercised* over the company, before its incorporation, a power like this which they exercised over it, after its incorporation; that is, whether they, of their own mere will and pleasure, ever appointed all the members of it at once.

And we find, that, at the origin of the company, the Council did a similar thing. The company was created out and out, by the Council. They appointed all of its original members. They did so on their own motion and volition. And they had the right to do so. The Act of 1824, "to establish an engine company, in the city of Savannah," and the Act of 1825, amendatory of that Act, gave the Council this power. (*Daws.* 458, 462.)

If then the meaning of these words in the charter, be, that the Council was to have, over the company after its incorporation, the same power which they had actually "*exercised*" over the company, before its incorporation, then, the Council had the power to make the appointment in question, for it had made a similar appointment, for the company at its origin.

But suppose the second be the meaning; viz, that the Council were to have the same power over the company, after its incorporation, as they had *possessed* over it, before its incorporation.

Then, the question will be, did the Council possess over the company, before its incorporation, the power to make such an appointment as the one in question.

The power of the Council, in this respect, was derived from the two Acts aforesaid—of 1824, and 1825. The first section of the Act of 1824, is in these words: "The corporation of the city of Savannah, shall have power and authority, and they are hereby empowered and authorized to nominate, select and appoint, certain individuals, being free white persons, and not exceeding twenty-one in number, and who, when so appointed, shall be known as the Engine Company of the City of Savannah."

The meaning here must be, that the Council might appoint twenty-one persons to form the company and might afterwards keep this number full, by supplying vacancies that might happen in it. This is the meaning—on which the practice has ever proceeded.

This being the meaning, it is clear, that the power thus conferred on the Council, if it remains undiminished, was sufficient to justify the appointment in question.

Has that power been diminished? It is not pretended, that it has been diminished by any Act of the Legislature. But it is insisted, that the power has been diminished, by an ordinance of the Council itself; the ordinance of 1825, in these words: "whenever any vacancies shall occur by death, resignation, or otherwise, in the said company, it shall be the duty of the members, immediately, to nominate a proper person to fill such vacancy, such nomination to be made from citizens, not under twenty-one, nor over fifty years of age, and the chief fireman, or commanding officer, shall immediately communicate such nomination, to Council, who shall reject or confirm the same." *(Ordinances, 162.)*

What this ordinance says, is, that it shall be "the *duty*" of the members to nominate—not, that it shall be their *right* to do so. Is that any restriction of the Council's power to fill vacancies? The council have the unlimited power to fill vacancies. They ordain, that it shall be the duty of the members, to nominate to them, "proper persons" to fill vacancies, when these occur. Is this saying, that the Council relinquishes the right to fill such vacancies, until such nomination be made? Suppose an ordinance had said, that it should be the duty of the city Marshal, to hand in a list of persons suitable for city printer, city surveyor, and for the various other city officers; and, that the appointment of these officers, should be made from the list, would that ordinance confer on the Marshal, the *right* to present this list, and at all diminish the power of the Council, to make the appointments, in the absence of the list? I much doubt it. And so I doubt, whether, this ordinance making it the duty of the members of the fire company, to nominate to vacancies in the company, at all diminished, the right of the Council to fill the vacancies, without such nomination.

And then it is a serious question, whether the Council has the right to pass an ordinance which would thus diminish its own power.

Supposing, however, that the Council has, and that they intended to diminish this power by this ordinance, the question still remains, to what extent, did they intend, so to diminish the power? Did they intend, that the power to fill the vacancies should not exist at all in the Council, unless a nomination to the vacancies, was made by the company; or did they intend more, than that the filling of vacancies by the Council, should be exclusively made from the nominations of the company, provided, the company would do its "duty," and make nominations? Surely it is going far enough, to say, that the Council could have intended as much as the latter. We think it is.

The result then, is, that, we think, that the City Council did have the right to make the appointment in question, and therefore, that the Court below was right, in holding the plea to be insufficient.

Judgment affirmed.

DAVID F. DICKINSON, plaintiff in error, vs. LIZAR SOLOMONS, defendant in error.

[1.] The entry made by a plaintiff in execution or the assignee of an execution, cannot, by making an entry of satisfaction on the execution, stating that it was satisfied by the sale to him of certain negroes, manufacture for himself a title to the negroes, and such entry cannot be admitted in evidence in support of his title.

[2.] If plaintiff in trover relies, among other things, on possession as evidence of title; and the defendant controverts the possession in plaintiff, and submits proof that the possession was in the person under whom he claims, a note given by such person for the hire of this negro is good evidence in rebuttal as explanatory of his possession.

[3.] New trial seldom granted to give a party an opportunity to impeach a witness, or to introduce new cumulative evidence, and never unless the party asking the new trial is without fault and has shown the utmost diligence to procure the evidence before trial.

Trover, in Chatham Superior Court. Tried before Judge FLEMING, at May Term, 1858.

This was an action of trover brought by David F. Dickinson against Lizar Solomons for the recovery of three negro slaves, Milo, Harriet and Alfred.

The negroes in controversy formerly belonged to Joseph Bush, who died in 1853. The plaintiff, Dickinson, claimed as purchaser from Bush in his lifetime. The defendant claimed in right of his wife, who was one of the heirs at law of Bush.

In the progress of the trial the plaintiff offered a certified copy of an execution in favor of Albert W. Smith against said Bush, and assigned by Smith to the plaintiff, with the endorsements and entries thereon. The *fi. fa.* was for $964 07 principal, and interest from 30th December, 1839, and $12 50 costs. Upon this *fi. fa.* was an endorsement by Dickinson that he had bought and received from said Bush the slaves, Lucy and her babe Peter, *Harriet*, and her boy *Alfred*, *Milo*, Stephen, Zina and Ben; and in consideration thereof he, Dickinson, had obligated himself to extinguish and satisfy said (within) *fi. fa.*, and to pay the further sum of $600.

There was a further entry of satisfaction in full of the principal, interest and cost of the *fi. fas.*, signed by Dickinson and dated 23d December, 1845.

This *fi. fa.*, with the entries and endorsements thereon, was admitted by the Court to prove *satisfaction* thereof, but not to prove that the plaintiff had bought and paid for the negroes in dispute, and this decision constitutes the plaintiff's first ground for a new trial.

The plaintiff, in rebuttal, offered in evidence a promissory note made by Bush to plaintiff, as follows:

"On the first of January, 1844, I promise to pay D. F. Dickinson, or bearer, sixty dollars for the hire of his negro woman and child for one year and four months' hire.

19th October, 1842.

[Signed] JOSEPH BUSH."

The Court refused to admit this note in evidence, and plaintiff excepted.

The jury found for the defendant, whereupon plaintiff moved for a new trial on the following grounds:

1st. Because the Court erred in refusing to admit in evidence the *fi. fa.* of Albert W. Smith vs. Joseph Bush, with the endorsements thereon, a copy of which is hereto attached, which was offered by the plaintiff to prove that he had paid for the negroes in dispute by entering satisfaction on the same; the Court having admitted said *fi. fa.* and indorsements to show the satisfaction only, but not to prove payment for said negroes.

2d. Because the Court erred in refusing to admit, as testimony in rebuttal for the plaintiff, the original note, of which the following is a copy, to-wit:

"On the first of January, 1844, I promise to pay D. F. Dickinson, or bearer, sixty dollars for hire of his negro wo-

man Harriet and child, for one year and four months' hire.
19th October, 1842.
[Signed] JOSEPH BUSH."

It having appeared from the testimony for the defence that the defendant claimed as the representative of the heirs-at-law of Joseph Bush; and it having further appeared that the said Harriet and her child Alfred were two of the negroes in dispute, and the signature of said note having been proved to be the handwriting of the said Joseph Bush.

3d. Because the said verdict was decidedly and strongly against the weight of evidence.

4th. On the ground of newly discovered testimony in this, to-wit:

That since the trial of said cause, the plaintiff has discovered that he can, by the testimony of John D. Walker and George Mixon, impeach the credit of David Ward, of Burke county, a material witness for the said defendant, whose testimony was taken by commission, and read on said trial; all of which will more fully appear by reference to the affidavits of the said plaintiff and of the said John D. Walker and George Mixon; neither the said plaintiff nor his counsel having been aware what the testimonyof the said David Ward would be, until the said commission was opened just previously to the said trial, and during the term of the Court when the same took place.

That since the trial of the said cause, the said plaintiff has discovered that he can prove by one Thomas Ogg, of Texas, formerly of this State, that he, the said Thomas Ogg, was cognizant of the sale and delivery of the said negroes by the said Joseph Bush to the said plaintiff; that he was also cognizant of the performance of part of the consideration for such sale; that said negroes were in the possession of the said plaintiff, while the said Ogg was in his employment; that previously to the said trial, the plaintiff had been unable to ascertain th place of residence of the said Ogg, and that he did not ascertain the same until after the said trial; and that he expects to be able to procure the testimony of the said Thomas Ogg by the next term of this Court; all of which will more fully appear by reference to the affidavit of the said plaintiff.

The Court refused to grant a new trial, and plaintiff excepted.

Jones & Sturges, for plaintiff in error.

Ward; **Owen & Jones**, *contra.*

By the Court.—**McDonald** J. delivering the opinion.

[1.] The error assigned in this record is on the judgment of the Court below refusing a new trial on the motion of the plaintiff. This was an action of trover for negroes, and the plaintiff offered in evidence a special entry endorsed on an execution in favor of Albert W. Smith, of which the plaintiff is assignee, against Joseph Bush, under whom defendant claims title, signed by himself for the purpose of proving title to the negroes sued for in himself. I know no rule of evidence on which this testimony can be admitted. The entry was manifestly the work of the plaintiff himself, Bush, the defendant, not participating therein or assenting thereto. At least, such participation or assent does not appear in the record. To admit it would seem to me to allow any holder of a *fi. fa.*, by his own entry to acquire the property of the defendant at his own will; or at least to manufacture evidence of a transfer of title for a consideration, which it might be difficult to rebut. Such special entries are out of the usual course of business. To enter satisfaction of an execution is against the interest of the plaintiff or assignee, but if at the time of entering satisfaction, he can acquire property to treble the value of the debt by saying in the entry, that the sale of that property was the consideration for the entry, it is certainly to his interest to do it. The mind of my brother Benning, who presided with me in this case, is not so well satisfied that the entry of satisfaction may not legally show the manner of satisfaction, and if necessary to be given in evidence, that the whole should not go together. I have already assigned my reasons of entertaining a contrary opinion.

[2.] The Court refused to admit, as evidence in rebuttal, the note, a copy of which is set forth in the second ground in the motion for a new trial. The presiding Judge considered it not rebutting testimony, which kind of evidence alone he said the plaintiff could give, at the stage of the case at which it was offered. But was it not rebutting evidence? The plaintiff had shown, or his witnesses had testified, that he had been in possession of the negroes a great many years. The defendant, on the contrary, introduced evidence tending to prove that Joseph Bush had always had the possession.

It was certainly in explanation of Bush's possession and in rebuttal of his proof, to show that his possession was on hire; and the note expressing on its face that it was for hire of negroes, was worth something as proof of that.

We think there is nothing in the ground taken, that the verdict was decidedly and strongly against the weight of evidence.

[3.] The last ground taken in the motion for a new trial is newly discovered evidence. The plaintiff claims to have discovered, since the trial, witnesses by whom he can impeach a material witness for the defendant. Perhaps a case may be conceived on which a new trial ought to be granted for the discovery of such evidence. But if there be such a cause, it must be where the party introducing the testimony to be impeached was guilty of a fraudulent contrivance to impose suddenly on the Court a witness, whose character the opposite party could, by no possible diligence, have impeached, and who gave false testimony. But in this case, the witness sought to be impeached, was known, his testimony was taken by commission, and the interrogatories propounded to him, indicated the proof expected to be made by him. The plaintiff ought to have known that the defendant expected to make proof adverse to his interest and to have made preparation, if he knew the evidence expected to be made, would be, if made false, to counteract its effects, and the first thing that would suggest itself to a prompt mind, would be, that the false testimony could be given by none but a witness of worthless character and incredible, and that it was necessary to enquire into his character without delay. Nothing of this sort was done. He risked the chances of a trial, and when a verdict was rendered against him, he set to work with great energy to get up grounds for a new trial, and was prepared, at the term of the Court at which the cause was tried, with evidence, submitted by affidavits to show that the character of the witness disentitled him to credit. There was gross negligence on his part before the trial, if he knew the evidence would be false if made.

There is even less pretense for a new trial on the ground that Ogg's evidence was newly discovered. Ogg had lived with the plaintiff; the affidavit states that the negroes were in his possession at the time. Instead of writing to him to know *what would be his testimony*, he ought to have presumed it would be the truth, and to have made out interrogatories and forwarded them with a commission, at once to take his testimony, instead of writing to him. The plaintiff deposes that he did not know his address until the reception of this letter. It seems that the letter written to him before the trial, was received by him, and the commission, perhaps, would have gone quite as well, and if sent a little sooner, might have been returned before the trial.

The evidence of this witness is cumulative merely, and, on that ground, is entitled to little consideration on a motion for a new trial.

We affirm the decision of the Court below on all the grounds taken in the motion for a new trial except the refusal to admit in evidence the note given by Joseph Bush for the hire of negroes, and on that ground must reverse his judgment refusing the new trial.

Judgment reversed.

GASPARD CARRIE et al., caveators, plaintiffs in error, vs. HENRY H. CUMMING, and another, propounders, defendants in error.

[1.] In cases of caveat of the probate of a will, the will and the allegations, if any, in support of it, and the caveat, or allegations against it, constitute the pleadings, and they ought to be submitted to the jury as making the issue between the parties. The reading of the will to the jury is no evidence of its validity.

[2.] A will written by an executor, who is also a principal legatee, ought not to be established without proof of instructions or knowledge of contents by the testator.

[3.] General reputation is inadmissible to prove that persons live in a state of concubinage.

[4.] A will is lawful or unlawful according to the act and intention of the testator, and its character in that respect does not depend on the object or purpose of the legatee in respect to the property bequeathed to him.

[5.] If the presiding Judge who certifies a bill of exceptions, annexes a note thereto explanatory of the ground of exception, the note must be taken in connection with the exception, in determining thereon.

Caveat to will, in Richmond Superior Court. Tried before Judge HOLT, at May Term, 1858. Appeal from Ordinary.

The propounders offered for probate a paper, purporting to be the last will and testament of John Carrie, deceased, late of the county of Richmond, of which the following is a copy:

STATE OF GEORGIA, Richmond County:

I, John Carrie, of said county and State, being of sound and disposing mind and memory, do make, ordain and publish this writing as and for my last will and testament, hereby revoking all wills heretofore made by me.

First: To my friends Louis Alexander Dugas and Henry H. Cumming, of the city of Augusta, and the survivor of them, I give, bequeath and devise all my estate, both real, personal and mixed, wheresoever situated, and of what kind soever the same may be, charged only with the payment of my just debts, funeral expenses, and other legal charges on the same, which I desire them to pay off in full as soon as possible after my decease.

Second: I nominate, constitute and appoint the said Louis Alexander Dugas and Henry H. Cumming, and the survivor of them, executors and executor of this will, and it is my will that they and the survivor of them be fully empowered at their or his discretion, and without reference to the Court of Ordinary or any other Court, to sell and dispose of the whole of my estate, in such manner, at such time and place, on such notice and such terms, as they in their discretion may deem expedient.

In witness whereof, I, the said John Carrie, have hereunto set my hand and seal, this sixteenth day of November, in the year of our Lord eighteen hundred and forty-seven.

his
JOHN ⋈ CARRIE.
mark.

Signed, sealed, published and declared by the above named John Carrie, to be his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses, at the request of said testator and in his presence, and in the presence of each other this 16th day of November, Anno Domini, 1847.

JH. BIGNON,
G. T. DORTIC,
GEO. G. McWHORTER.

The probate of said paper as the last will and testament of John Carrie, deceased, was resisted by the Caveators, who filled the following grounds of Caveat:

1st. Because the said John Carrie was not of sound and disposing mind and memory at the time of the execution and publication of said alleged will.

2d. Because the same was not executed in the manner and form required by the statute in such case made and provided.

3d. Because of undue, illegal and improper influence, used and exercised by one Mary Bouyer, a free person of color, over the said John Carrie.

4th. Because said alleged will is violative of the provisions of the Acts of the General Assembly of the State of Georgia, in relation to manumission of slaves, and dispositions of real estate and slaves to free persons of color.

5th. Because said alleged will is against the settled policy of the State of Georgia, in relation to slaves and free persons of color, in this, that it is an attempt, by a secret trust, to maintain the slaves of the deceased.

6th. Because said alleged will is against the same policy, in this, that it is an attempt, by a secret trust, to secure to Mary Bouyer, a free person of color, the beneficial interest in slaves and real estate, lying in the city of Augusta.

7th. Because said alleged will does not express the intention of the said John Carrie, as to the ultimate disposition of his property.

8th. The paper, propounded as the last will and testament of John Carrie, is null and void, for that the said John Carrie made and executed the same for the purpose of effecting or endeavoring to effect the manumission of a slave named or usually called Mary Bouyer, by conferring or attempting to confer freedom upon her, and by allowing and securing and attempting to secure and allow to said slave the right or privilege of working for herself, free from the control of the master or owner of said slave, and of enjoying the profits of her own labor and skill.

The evidence having been concluded, and the case argued by counsel, the Court was requested by the propounders to charge as follows:

That to constitute a secret trust in devisees of land or legatees of slaves, there must have been some contract, agreement or stipulation, written or parol, between them and the testator.

That the mere expectation or hope of a testator, that his legatee would dispose of the property given, in a manner not set forth in the will, creates no trust in the legatee.

That the intention of the legatees, as to the disposition they will make of their interest in the estate, cannot affect the construction of the will.

That, to render a trust, express or implied, in favor of a free person of color, obnoxious to the provisions of the Act of 1818, the interest, intended to be secured, must be an interest in the land and slaves themselves.

That the 8th section of the Act of 1818 does not apply to any trust for the benefit of slaves.

That it is competent to a testator, in bequeathing a slave, to make an express provision for the kind treatment of such slave, and that such a bequest and provision do not amount to manumission, nor are they vitiated by a gift of other property therewith; and that a parol request for such kind treatment made prior to, simultaneously with, or after the execution of the will, cannot invalidate it.

All which charges were given by the Court to the jury, as requested by propounders; and counsel for the caveators then excepted and now except to each and all said charges as given.

The counsel for the caveators requested the Court in writing to charge the jury as follows:

If the draftsman of a will take a considerable interest under it, the transaction will be viewed with extreme jealousy, and the jury must, in such case, be satisfied that the testator knew the contents of the will..

Courts will look with suspicion upon testaments of this character. The presumption is strong against an act done by the agency of the party to be benefited, especially where the capacity of the testator, at the time the will was executed, is in any degree doubtful. The Courts will not presume fraud, but they will, under such circumstances, require strong proof of intention.

All and every will, testament and deed, whether by way of trust or otherwise, contract, agreement or stipulation, or other instrument in writing, or by parol, made and executed for the purpose of effecting or endeavoring to effect the manumission of any slave or slaves, either directly by conferring or attempting to confer freedom on such slave or slaves, or indirectly, or virtually, by allowing and securing, or attempting to allow and secure to such slave or slaves the right or privilege of working for his, her, or themselves, free from the control of the master or owner of such slave or slaves, or of enjoying the profits of his, her, or their labor or skill, are utterly null and void.

No free person of color can be permitted to purchase or acquire any real estate, lying in the city of Augusta, or any slave or slaves, either by a direct conveyance to such free person of color of the legal title of such real estate, or slave or slaves, or by any conveyance to any white person or persons of such legal title, reserving to such free person of color the beneficial interests therein, by any trust, either written or parol, by any will, testament, or deed, or by any contract, agreement, or stipulation, either written or parol, and securing or attempting to secure to such free person of color, the legal title, or equitable or beneficial interest therein.

Any such trust may be shown by parol testimony.

No special words are required for the creation of a trust.

Any words or acts, going to show a design on the part of John Carrie that the property conveyed to the legatees named in his will, should be held by them for the benefit of another person, will create a trust.

If the jury believe that by the will offered in evidence, John Carrie *attempted* or *endeavored* to do any act prohibited by the Act of 1818, already cited, the will is void, notwithstanding the attempt may not have been successful, and notwithstanding the legatees, H. H. Cumming and L. A. Dugas, knew not of such attempt or endeavor. Their knowledge of the illegal attempt is not necessary to render void the instrument by which such illegal attempt was to be executed.

A trust *may* be created without the knowledge of the trustee; such want of knowledge on the part of the trustee does not prevent the *creation*, or the *attempt* to create the trust.

The legatees, in this case, cannot take any property for Mary Bouyer, whether slave or free, which she herself could not take.

If the jury believe that Mary Buoyer is a slave, and if they find that she was in the possession and under the control of John Carrie, he exercising acts of ownership over her, for more than four years prior to the date of the alleged will, the legal presumption is that she was his slave at that time.

All which charges were given by the Court to the Jury, as requested by the caveators. After reading them to the jury, and charging them as law, the Court concluded his charge to the jury with the remark: "But, gentlemen of the jury, the question in this case for your consideration and determination is, is this the last will and testament of John Carrie? If it be, you must establish it by your verdict. If it be not, you must find against the will." And to this concluding part of the charge, counsel for the caveators excepted.

In a note by Judge Hall, appended to his certificate, he remarks: "I do not remember the precise words with which the charge to the jury was concluded, but I am certain none were used to retract or vary in the slightest degree, the principles or statements of law given in the charge to them."

MILLERS & JACKSON, for plaintiffs in error.

CHARLES J. JENKINS, *contra.*

By the Court.—MCDONALD J. delivering the opinion.

The case presented in this record, arises on the will of John Carrie. Upon the face of the will, there is nothing which excites suspicion of either the capacity of the testator, fraud, or undue influence in its procurement, of the legality of its provisions or the regularity of its execution. It is caveated, however, and the allegations against it are all matters, which depend for support on extrinsic evidence. The grounds of caveat will be found in the Reporter's statement of the case.

[1.] The subscribing witnesses were introduced, who proved the execution of the will. After this proof, the will was offered in evidence by the propounders, and the caveators objected, upon the ground, that its execution according to law, had not been proven, and because of the circumstances of suspicion developed by the testimony. The Court overruled the objection and the caveators excepted.

This Court here announced, that it had already decided that a contested will should be submitted to the jury as the subject to which the evidence was to apply; and thereupon this assignment of error was not further insisted upon. The will and allegations, if any, in support of it; and the caveat or allegations against it, constitute the pleadings in such cases, and ought, in the outset, to be placed before the jury. This proceeding imparts no validity to the will. *Lucas vs. Parsons, et al.* 24 *Ga. Rep.* 640.

[2.] One of the circumstances of suspicion developed by the testimony, relied on to exclude the will from the consideration of the jury was, that it was written by one of the executors, who was also a principal legatee, and there was no evidence that the testator knew its contents. The objection would certainly have been a good one, if the paper had been admitted in evidence as a *valid* will, for no evidence had been offered that the testator had given instructions for it, and that it was written in accordance with those instructions; or that he had read it; or that it had been read to him; or that he had knowledge of its contents. Without such evidence the jury would not have been warranted in setting up the paper as a will, but this evidence was subsequently supplied. The want of it at the time the paper was offered, was no objection to its being submitted to the jury, as the subject to which the whole evidence was to apply. Indeed, as already remarked, the proper time to have read it was at the opening of the case.

[3.] The caveators proposed to prove by general reputation, that John Carrie, the testator, and Mary Bouyer, who was a woman of color, lived together in a state of concubinage, he keeping her as his mistress. The Court below rejected the evidence, and his decision is excepted to. Independent of other objections, the relevancy of this testimony is not very apparent, as the case stands in this record. We can conceive circumstances, which, if they existed, and were proven, might entitle the proof proposed to be made, to much consideration in trying some of the issues made by the caveat. But there is a total absence of proof of the sort to which I allude. But under no circumstances and in no connection can the fact that persons lived together in a state of concubinage be proven by general reputation.

[4.] Col. Henry H. Cumming was introduced as a witness by the caveators for the purpose of establishing the 4th, 5th, 6th, or 8th ground of caveat, or perhaps all of them. Col. Cumming was one of the executors of the will, and also a legatee. While under examination he was asked by the caveators, what was his intention as to the disposition of any property which he might receive under the will of Mr

Carrie? And if he intended to use the same for the benefit of Mary Bouyer, was not that intention based upon, or did it not grow out of the known wishes of Mr. Carrie, upon that subject? The counsel for the propounders objected to the questions and answers thereto. The Court sustained the objection and the counsel for the caveators excepted.

If an affirmative answer had been given to both questions, it does not follow that the will would have been obnoxious to any of the objections urged against it. The terms of the will are unambiguous and positive. There is no trust created thereby, for any person or any object whatever. There are no instructions to the executors. The questions propounded do not imply a conditional bequest or an *undertaking* on the part of the executors or legatees, to hold the property in trust for any object. It was the testator's intention, and not the legatees, which would vitiate the will, if its objects were illegal. But the witness under examination was one of the propounders of the will. He proposed to carry it into effect, and if it contemplated a violation of the laws of the State, he, accepting the legacy for an illegal object, would have been subject to penalties for engaging in, or contributing to the illegal purpose. He could not be compelled to answer. But if the testator knew that he could not, either directly or indirectly, according to the laws of the land, provide by will or otherwise, for the manumission of slaves, or make testamentary dispositions of real estate and slaves to free persons of color; or attempt by a secret trust to manumit slaves; or attempt by a secret trust, in his will, to secure to a free person of color the beneficial interest in slaves and real estate lying in Augusta, and he made a will, however much he may have desired it, with no such purpose, but bequeathed his entire estate to friends, with no injunctions whatever so to appropriate his property, or as to its ultimate destination, it cannot invalidate the will, if the legatees, knowing his strong desire, but being under no obligation of any sort to execute it, of their own volition, give the property in that way, or use it for those objects. It is their own property, and if they so apply it, they lay themselves liable to the penalties of the law, and are subject to punishment without reference to the source whence the property was derived.

After the testimony was delivered to the jury the counsel for the propounders submitted to the Court in writing, six requests to charge the jury, which were all given, by the Court. The counsel for caveators excepted to the several charges so given. The requests will be found in the Reporter's statement of the case. The first request is in accordance with the law. "To constitute a secret trust in devisees of land or legatees of slaves, there must have been some contract, agreement or stipulation, written or parol, between them and the testator." What kind of evidence is sufficient to establish such contract, agreement or stipulation is not a proper subject of investigation here. If a legacy be given in the will coupled with a trust of any sort given unknown to the legatee, his acceptance of the legacy, perfects a stipulation or agreement to carry out the trust, which before acceptace was in the nature of a proposition by the testator. A proposition of this sort, for an object in contravention of the statute, would be an *attempt*, under the Act, and would vitiate the will. There is no proof of such thing before us.

We understand the second request to have been made in reference to the evidence in this cause, and not to a case in which the expression of an expectation or hope of a testator, is considered as equivalent to directions which are obligatory. The request as asked literally, is the law; for an absolute bequest of property carries to the legatee the power and right of the legatee to dispose of it as he pleases, uncontrolled by the verbal expression of the hope or expectation of the testator.

The third, fourth and fifth instructions asked, it is sufficient to say, are unquestionably legal.

Making the same remark in reference to the sixth request made, I will add that it is not only legal, but commendable for the owner of a slave, in bequeathing her, to provide for her kind treatment, which amounts to nothing more than that while she is required to perform the service of a slave, she shall be comfortably clothed and suitably fed, that excessive labor shall not be required of her, that she shall not be unnecessarily and unreasonably chastised, and that, when sick, she shall have the nursing and medical attention which her situation requires. The law imposes these duties on all owners of slaves, and it cannot be an objection to a will that the testator who bestows his bounty on a friend, should ask or require of that friend the performance towards the slaves he gives, of the *legal* duties of humanity.

The counsel for the caveators asked the presiding Judge to give in charge to the jury ten different instructions, which he did. These are not excepted to of course, by the plaintiff in error. We are not therefore called on to review them, or to determine whether they are all sustained by the law, as applicable to the case before us.

[5.] The last part of the charge of the Court, stated in the bill of exceptions, taken alone and disconnected from the rest, is certainly erroneous; but the presiding Judge annexes a certificate, which must be taken in connection with it, that he does not recollect the precise words, with which the charge to the jury was concluded, but he is certain none were used to retract or vary in the slightest degree the principles or statements of law given in charge to them. This being so, the conclusion of the charge as stated in the bill of exceptions must be taken in connection with the charges founded on the objections to the probate of the will and taken with them, there is nothing in it to disapprove.

Judgment affirmed.

STEPHEN F. KELLER, plaintiff in error, vs. **JOHN DILLON**, defendant in error.

If the Court gives an erroneous charge to the jury and the verdict be in conformity with the charge, the party against whom it is given, is entitled to a new trial; and it is error to charge the jury that if a claimant construct a wood rack on the right of way of a Railroad Company taken from the land so claimed, such structure or use of it, is evidence of possession of the land from which the right of way was taken.

Ejectment, in Effingham Superior Court. Tried before Judge FLEMING, March Term, 1858.

This was ejectment by John Dillon against Stephen F. Keller, for a tract of pine land in Effingham county, situated on or near the Central Railroad, containing one hundred and eighty-four acres.

The testimony being closed, and the Court having charged the jury, they found for the defendant. Whereupon the plaintiff moved for a new trial, upon the following grounds:

1st. Because the verdict was contrary to law.

2d. Because the verdict was contrary to the evidence.

3d. Because his Honor erred in charging the jury, that the erection and use of a *wood rack*, to sell wood to the Central Railroad within a few feet of the track of said road, was such evidence of possession and actual occupation by the defendant and those under whom he claimed, as to defeat the plaintiff's title, which was otherwise good.

4th. Because his Honor erred in charging the jury, that the erection and use of a *wood rack* on the premises, by the defendant, and those under whom he claimed, for seven years previous to the suit, was sufficient evidence of possession to defeat plaintiff's title otherwise good.

5th, and 6th. Because the verdict was without evidence, and contrary to the weight of evidence.

7th. Because since the trial, the plaintiff has discovered new evidence material to the issue, and not before known to him or in his power to procure by diligence.

To which decision counsel for defendant excepted.

John M. Millen, for plaintiff in error.

Lloyd & Owens, *contra.*

By the Court.—McDonald, J. delivering the opinion.

The Court below granted a new trial, on the ground of error in his charge to the jury, on the question of adverse possession. The jury under the evidence and charge of the Court found a verdict for the defendant. He defended on the ground of possessory title as well as title paramount. He had erected a wood rack on the right of way of the Central Railroad, cut wood from the land in dispute, hauled it to his rack and sold it to the Railroad Company for more than seven years. The plaintiff claimed, also, to have a good statutory title. The presiding Judge says, that he thinks his charge was in substance, that even, if the jury should find that at one time the plaintiff had a good statutory title, yet that title was defeated, if they should find that the defendant had erected a wood rack on the land, (although that wood rack was on the right of way of the Railroad,) for the purpose of selling wood to be cut from the land, and that the defendant and those under whom he claimed, did cut wood from the land and sell from said rack for the period of seven years. That, in such case, the statutory title of the plaintiff would be defeated by the statutory title of the defendant. The presiding Judge granted a new trial, on the ground that there was error in this charge to the jury. The charge was manifestly wrong, and, of consequence, the awarding of a new trial was right. When the Railroad Company acquires the right of way overland, the fee simple title vests in the company. The title as effectually passes during the existence of the company, as if the owner had executed a deed of conveyance. An entry upon the right of way and erecting a wood rack thereon, is, therefore, an entry on the Railroad Company, and not an entry on the owner of the balance of the tract of land not taken for the right of way. If the construction of the wood rack and the open and continuous possession of it long enough to give a statutory title, gives a title against any one, it gives it against the company who is the owner; the bare possession of it without regard to the length of time, being a sufficient title against the world besides. In a contest of that sort, the company would be apt to show a permissive possession, which would harm no one. That the defendant cut and hauled wood from the premises in dispute to a rack on the land of another, and sold it there, is not such a notorious, visible and continuous possession, (even if the acts be continued throughout the statutory period, as such things are usually done, at intervals,) as is sufficient to apprize the owner that the trespasser is a claimant of the land. We affirm the judgment of the Court in awarding a new trial on this ground.

In the opinion delivered on the motion for a new trial, the presiding Judge does not say that he did not decide as stated in the first assignment of error in this record. He assigns a good reason why he ought not to have decided so, viz: that as the plaintiff's title depended upon the statute, it was the peculiar province of the jury to say whether under the evidence, a statutory title had been made out. But if the Court did so decide and charge the jury, there was error in that charge because it was an invasion of the province of the jury. Perhaps it was objectionable on another ground also. The Court says that the paper title of the defendant is complete from the grantee down to himself, and so it appears to be in tho record before us. If so, and there was a house on the land which was occupied at intervals only, the presumption of law is, that during the time that it was not actually occupied, the possession was in him who had the paramount title. Hence, every breach in the continuity of the possession of him who claims a statutory title only, is equivalent to the entry of the true owner on the premises, and the possession of him who claims a possessory title must date from the time of his re-entry, if he returns. It is unnecessary to say more, as the case goes back for another trial.

Judgment affirmed.

EDWARD B. HOOK, plaintiff in error, vs. STOVALL, DUNN & Co., defendants in error.*

[1.] Duty of the Court to admit material evidence to the jury, at any time before the argument before the jury is closed, provided the evidence was not within the knowledge of the party offering to introduce it before.

[2.] It is no ground for continuing a cause, that one of the jury, after he was taken to try a cause, was discovered to be incompetent.

[3.] If in defence of a note given for a negro warranted to be sound, the maker pleads her unsoundness at the time of the sale as a failure or partial failure of consideration, the sayings of the maker of the high value he placed upon the negro before her unsoundness was discovered, and also that he did not offer to return her, may be given in evidence by the opposite party to reduce the damages to which the purchaser claims to be entitled.

[4.] If, on the trial of such suit, the Court charge the jury, that "although they find the covenant to be broken, if they find that at the time of the sale, the slave in her unsound state, was worth the price for which she was sold, the defendant has sustained no damage," it is error; the jury cannot remodel the contract of the parties, and on the breach of covenant, the damages are to be ascertained by finding the difference of the value of the negro in a sound and her unsound condition.

[5.] Before the jury can find the full amount of a note given for a negro warranted to be sound, to the suit on which a plea of failure and partial failure of consideration is pleaded, the jury must find that the negro was not diseased at the time of the warranty.

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* This case was before this Court at Savannah, January Term, 1857, and will be found reported in 21 *Ga. Reports*, *p.* 69.

[6.] Physicians are experts as to diseases, and their opinions as such, in respect to them, are admissible in evidence; but they are not experts as to the value of negroes, and their opinions in that respect are not entitled to higher consideration than those of other witnesses.

Complaint, in Jefferson Superior Court. Tried before Judge HOLT, at June Term, 1858.

This was an action by Stovall, Dunn & Co. against Edward B. Hook, on a promissory note for $630, dated March 6th, 1852, and payable on or before the 1st day of January, 1853. The defendant pleaded: First, the general issue; second, partial failure of consideration in this: that said note was given for a negro bought by defendant from plaintiffs which said negro plaintiffs warranted to be sound, whereas, the fact was otherwise, the negro being, at the time of sale, unsound, having a disease in one of her eyes, which greatly depreciated her value; third, total failure of consideration in this: that by reason of said diseased eye, said negro was of no value to defendant, and the consideration of said note had totally failed.

The plaintiffs offered in evidence the note sued on and closed. The defendant submitted his proofs. The plaintiffs replied and closed the case. One of the counsel for plaintiffs was about to open the case to the jury late in the evening, when one of the jury complaining of indisposition, the case was adjourned over until morning. The Court permitted the jury to separate without the usual instructions not to allow any one to converse with them in relation to the case, although requested to give such instructions by defendant's counsel.

At the opening of the Court the next morning, the counsel for plaintiffs made a motion before the Court to permit them to offer other testimony which they had discovered since the adjournment of the Court the evening before, and made affidavit to that effect; which motion was resisted by defendant's counsel, upon the grounds, first, that there was no rule of practice allowing such a proceeding; and second, that it would be establishing a very dangerous practice; which objections were overruled by the Court.

Whereupon the plaintiff then introduced one of the jurors, Elisha Smith, who testified that he was at defendant's house before he left the Carson place; thinks it was in 1855 or '56, but is not certain, that it might have been in 1854; heard defendant say that he would not take one thousand dollars for the girl; is not certain whether the conversation occurred in 1854 or 1855; that he had mentioned this fact to Henry Farmer, one of his brother jurors in the case, and that he had told it to no one else. He also stated that said conversation had stayed by him, and would always do so—that it had its effect on his mind, and would always do it, and would influence him in making up his verdict. When asked by the Court if the impressions of that conversation would influence his mind in giving a verdict in said case, irrespective of other testimony in the case, he replied that it would not, and that he did not know how the fact of the conversation with the defendant, above stated, was communicated to the plaintiffs since the adjournment of the Court the evening before.

The defendant's counsel objected to the conversation testified to by said Smith, because it was not proven to have taken place subsequent to the development of the disease in the eye, which objection was overruled by the Court, and the witness permitted to testify.

The defendant's counsel then moved that the case be withdrawn from the jury, upon the ground that the testimony of the juror, Smith, clearly showed that he was not an impartial, unprejudiced and competent juror, which motion was overruled by the Court.

The plaintiffs then introduced *Reuben Carswell*, Esq., who testified that it was his impression that the defendant lived at the Carson place in December, 1855; would not be certain. It might have been in July of that year.

Plaintiffs then introduced *William A. Stokes*, who testified that defendant left the county about two years ago, and left the Carson place about three or four years ago, about the year 1854 or 1855.

Plaintiffs then finally closed their case.

The defendant then recalled the plaintiff's witness, *Henry Farmer*, one of the jurors, who testified that Elisha Smith, one of his brother jurors, told him that he would tell him something when they went into the jury-room that would influence his (Farmer's) verdict, but that said Smith was mistaken in his testimony when he testified that he had told him (Farmer) what Hook had said about the value of the negro, in the jury box—that he (Farmer) had not communicated what the said Smith had told him, to plaintiffs or any one else, and does not know how the plaintiffs got the information.

Then the defendant finally closed his case.

After argument had before the jury from both sides, the Hon. Wm. W. Holt presiding, charged the jury as follows:

Gentlemen of the jury, much upon which you will have to pass in making up your verdict in this case, seems to be admitted, at least has not been contested before you; that the defendant made the note upon which suit is brought, that its consideration was the price of the female slave sold to him by the plaintiffs, and that in the sale she was warranted by the plaintiffs to be sound in every respect.

It is upon this warranty of soundness the case principally turns. In the bill of sale she is described as having one eye larger than the other, and the defendant alleges that this enlargement of the eye is a disease, and that the slave being thus unsound at the time of sale, the plaintiff's covenant is broken, and that he has a right to an abatement from her price equivalent to the damages he has thereby sustained. The question of soundness or unsoundness is therefore directly submitted to you, and is to be decided upon the evidence produced by the parties. The defendant relies upon the opinion of two physicians, whose testimony you have heard, and upon the facts testified to by the woman in whose employment the slave was when her first child was born, of an increased enlargement of the eye consequent upon that event.

The plaintiffs rely upon the fact that the defendant kept the slave for three years without complaint of unsoundness, or offer to return her and cancel the contract of sale, he himself being a skillful physician. This he was not bound to do to entitle him to the benefits of the plaintiff's covenant; yet it is a fact, being the conduct of the defendant himself, which may be considered by you in determining the question whether that covenant has or has not been broken. If you find it to have been broken, the next thing to be considered by you will be, the damages which the defendant has thereby sustained, the just measure of which is the difference in the value of the slave sound and unsound. Her value as sound is agreed between the parties in the price to be paid. Of her value as unsound, you have the testimony of the witnesses that have been examined to that point, and the admissions of defendant as they have been given in evidence upon which you must decide, and these admissions of the defendant should have more or less weight, according to the opportunities the defendant had at the time they were made, of knowing the actual condition of the slave. Whatever difference you may find must be deducted from the note.

But, although you find the covenant to be broken, if you find that at the time of the sale the slave in her unsound state was worth the price for which she was sold, the defendant has sustained no damage. The whole case is submitted to you upon the testimony.

The counsel for the defendant, amongst other things, requested the Court to charge the jury:

1st. That before they can find the full amount of the note sued upon to be due, they must first find that the eye was not diseased at the time of the warranty.

2d. If the jury believe from the evidence that the negro girl Mary was unsound at the time of the sale, then that the sayings of defendant as to his valuation of the negro girl are entitled to no consideration or weight in reference to the question of soundness or valuation of the negro girl, unless said sayings are proven to have occurred subsequently to the development and increased action of the disease.

3d. If it has not been proven to the jury that the defendant's valuation or consideration in relation to the valuation of said girl occurred after the development and increased action of the disease, the jury should exclude said conversation in their consideration and investigation of the issue in the case.

4th. The opinion of Drs. Dixon and Campbell in relation to what they consider the negro girl worth in their estimation, is proper evidence to be considered by the jury, as the opinion of experts.

5th. If Hook, the defendant in this case, had even paid portions of the purchase money from time to time, still it would not preclude him from holding plaintiffs to a strict compliance with their contract under warranty.

Which charges the Court refused to give, and defendant excepted.

The jury found for the plaintiffs the full amount of the note, with interest and cost of suit. Whereupon defendant excepted and assigns as error the rulings, decisions, charges and refusals to charge above set forth.

JAMES S. HOOK; and JOHN SCHLEY, for plaintiff in error.

E. H. POTTLE, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

This cause is brought to this Court on exceptions to sundry rulings of the Court below during the progress of the trial, and also upon exceptions to the charge of the presiding Judge to the jury, and to his refusal to charge the jury as requested by the counsel for plaintiff in error.

The counsel for the plaintiff in error insists upon five of the errors assigned in the record, which are as follows:

1st. "That the Court erred in permitting the case to be reopened, after it had been closed the evening before, to permit the counsel for defendants in error to introduce a juror, whose testimony had been communicated to defendants in error or their counsel, between the adjournment and the meeting of the Court the next morning."

2d. "That the Court overruled the motion made by counsel for plaintiff in error to withdraw the case from the jury, after the testimony of the juror, Elisha Smith, showing he was not an impartial juror."

3d. "That the Court overruled objections made by counsel for plaintiff in error, to certain parts of the testimony of Isaac Averett, James C. Hudson and Elisha Smith, the juror, in relation to the sayings and acts of the plaintiff in error."

4th. "That the Court charged the jury that the admissions of plaintiff in error, as they were given in evidence, were to be considered by them, in deciding whether the negro girl was sound or unsound. And although they should find the covenant to be broken, if they should find that the slave, at the time of the sale, was worth the price for which she was sold, the plaintiff in error has sustained no damages.'

5th. "That the Court refused to charge the five points at law as requested by counsel for plaintiff in error."

[1.] The Court committed no error in permitting the case to be re-opened, to allow the defendants in error to introduce additional evidence, after the case had been closed. The Court sits to administer the law and do justice between parties litigant, and it is its duty to admit evidence material to the issue at any time before the argument before the jury is closed, provided the evidence was not within the knowledge of the party offering it, until after the case was closed. This Court has held that after a cause had been partially argued before the jury, the presiding Judge ought to have heard the testimony of a witness, who was in Court during the introduction of the evidence; but who had absented himself under the belief that his evidence was not needed.

[2.] That a juror summoned and sworn was discovered, after he was sworn, to be incompetent, from partiality, bias or prejudice, to try the cause, is no ground for putting off the trial Upon a proper showing, another juror might have been substituted.

[3] The ruling of the Court admitting the evidence of Averett, Hudson and Smith in relation to the sayings and acts of the plaintiff in error, is sustained by us. The evidence objected to, relates to the sayings of the plaintiff in error as to his satisfaction with the negro and the high estimate he placed upon her before it was ascertained that the deformed appearance of the eye was the effect of an existing disease in that organ. There were two matters of enquiry before the jury who tried the cause. The first was, as to the soundness of the negro at the time of the warranty The second was, if she was unsound at that time, to what extent was the plaintiff in error endamaged by reason of her unsoundness. As long as the plaintiff in error regarded the appearance of the eye as a mere deformity, his sayings as to the high value which he placed upon her are not to be

considered as evidence of her soundness, for he purchased her as deformed, but also as sound. The sayings of the plaintiff in error as to her value down to the development of the disease in the eye, was certainly admissible to satisfy the jury that he had not been so much endamaged as if the negro had been wholly worthless. That the plaintiff in error did not return her nor offer to return her, neither before nor after the development of the disease of the eye, was entirely admissible in evidence before the jury. That he did not propose to return her was evidence that he was not willing to rescind the contract, but that he would be content to be allowed in a settlement whatever damage he might be entitled to for a breach of the warranty. It is not necessary, in every case, for the purchaser to propose to return the property purchased, to entitle him to an allowance of the entire consideration agreed to be paid, under an act authorizing a plea of total failure of consideration. In this trading country, where negroes, horses and mules are carried from one State to another, and sold at the residence of the purchaser, in a State other than that of the seller's residence, it would be extremely difficult and expensive for him to offer to return the property; but when the parties live at a convenient distance from each other, or the purchaser has an opportunity to return the property purchased, and he does not make such offer, his failure to do so may be submitted to the jury as evidence that there was either no breach of contract, or if there was, that he was willing to hold on to his contract, and recover, or be allowed the amount that its damaged or diseased condition reduced its value at the time of the sale.

By taking the whole evidence together, there was no indefiniteness as to which negro the evidence applied. The evidence shows that the plaintiff in error had purchased of defendants two negroes, and that he had paid for one of them; so that the price for one only is in dispute. Besides, the bill of sale of this negro and the note sued on, have the same date, and the consideration expressed in the bill of sale, is the precise amount of the note.

[4.] The fourth ground of error relied on by the plaintiff in error in this Court, is assigned on the charge of the Court. The charge excepted to was, that, although the jury should find the covenant to be broken, if they should find, at the time of the sale, the slave, in her unsound condition, was worth the price for which she was sold, the plaintiff in error has sustained no damages. This charge is erroneous. It authorizes the jury to remodel the contract of the parties without their consent. Every man, in making a contract, acts upon his own judgment as to the value of the property he purchases. The plaintiff in error purchased the negro, which was the consideration of the note sued on as a sound negro, and the price stipulated between the parties was her agreed value in a sound condition. She was warranted to be sound. It is not to be supposed that the purchaser would have given as much for her in her unsound state, as if she had been sound. The contrary is the legal and common sense presumption. The charge authorizes the jury to say that, admitting the negro to have been unsound at the time of the sale and warranty, and that *that* unsoundness, according to the evidence, impaired her value, yet the purchaser ought to have given the price he paid for her, as, in our judgment, she was worth that sum in her diseased condition. If a man purchases land at so much per acre, and gives his note for the purchase money, taking a warranty that there are so many acres, and it turns out, upon survey, that there is a deficiency in the number of acres, it is no reply to a plea of this deficiency to an action upon the note, that at the time of the sale, the land conveyed, notwithstanding the deficiency in the quantity and the breach of covenant, was worth the sum agreed to be paid for the whole.

The enquiry of the jury in this case was a simple one. How much was the negro girl less valuable at the time of the sale, by reason of the latent disease in the eye, than if she had been sound. This they might easily have determined by considering the evidence as to the effect of the disease upon her after it was developed. The difference between her value sound, without reference to the price to be paid for her, and her value, diseased as she was, being ascertained, that difference was the damage to which the plaintiff in error was entitled, and should. have been deducted from the amount of the note at the time it was given. The plaintiffs in the Court below were entitled to a verdict for the balance with interest thereon. If the jury find a breach of covenant, they must look to the whole evidence, and from that come to the best conclusion they can as to the damage resulting to the injured party therefrom, and be it much or little, allow it to him.

The counsel for the plaintiff in error made, of the presiding Judge in the Court below, five requests to charge the jury, which are set forth in the statement of the case prefixed to this opinion.

[5.] The first request ought to have been given in charge to the jury. It is true, that the Court had given it in charge nearly substantially, yet being refused when a direct application was made, might have led the jury to believe that such request was not law. I am but little disposed to countenance the practice of embracing in requests of the Court to charge the jury, matters which have already been given in charge. From what I have already said it will be seen that, in our judgment, the second and third requests ought not to have been given in charge.

[6.] The fourth request to charge was properly refused by the Court. Physicians are regarded as experts as to diseases, but not as to the value of negroes, sound or unsound. In regard to value, their opinions, as physicians, are not entitled to higher consideration than that of other witnesses; and perhaps not to so much.

There is no evidence in the record to warrant the fifth request. It does not appear that the plaintiff in error had ever paid any part of the purchase money of the girl Mary. Hence the Court committed no error in refusing to give it in charge to the jury.

Judgment reversed.

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ADMINISTRATORS AND EXECUTORS.

1. W. dies leaving O. and W. his executors. O. qualifies, and after acting for six years, dies; when W. qualifies. The administrator of O. prefers a claim under the Act of 1847 for *extra services* rendered to the estate of W. by his intestate in superintending plantations and negroes.
Held, That W., the acting executor, at the time the claim for compensation is made, is the proper party to dispute the demand and litigate it before the Courts. *Owen, adm'r. vs. Walker, ex'or.* 347

2. A debt was not made known to the executor, until after the expiration of the twelve months within which, the law requires debts to be made known to an executor, and after he had distributed all the assets, except the share of one legatee.
Held, That he was nevertheless bound to apply this whole share, first to the debt. *Yerby adm'r. vs. Mathews.* - - - - - 549

3. Joint executors are "joint contractors," as it concerns contracts of their testator; and therefore, service on a part of them and a return of, not to be found, as to the other part, is sufficient, in an action against them. *Wynn vs. Booker et al.* - - 553

AMENDMENT.

1. It is the right of the party to amend, but the *duty* of the Court to prescribe the terms; and Courts should exercise this duty so as to discourage negligence and delay in the management of cases. *Chambless, adm'r. vs. Taber,* - - - - 167

2. The plaintiff in ejectment may amend by striking out two of three defendants and proceeding against the remaining third.

The question as to who may be joined as defendants in an action of ejectment, considered. *Cunningham vs. Bradley et al.,* - - - - 238

3. A bill in Chancery will not be amended to enable the complainant to introduce matter which could not possibly have constituted a part of it at the time it was filed, in order to vitiate proceedings subsequently had, which were legal and regular at the time. *Camp vs. Bancroft, Betts & Marshall,* - - 393

4. Quarles sued Tumlin, and D. House, and F. H. House, on a note made by Tumlin, and payable to D. House, and by him endorsed to F. H. House, and, by him, to Quarles—the note not containing words of negotiability.

Held, That Quarles might amend his declaration, by striking out the two Houses, as defendants, and making D. House a plaintiff suing for his, Quarles', use. *Tumlin vs. Quarles,* - - - 395

5. To sustain a motion for Magistrates to amend their return to a writ of certiorari, which from their certificate seems to be full, there must be an affidavit of its incompleteness. *Harris vs. Nichols,* - 413

6. Declaration amendable being substantially correct; process calling party to wrong day, also amendable if defendant appeared at the time fixed on for the Court and moved in the case. *Townsend vs. Stoddard & Co.,* - - - - - - 430

7. Affidavits of the parties, under the Act of 1854, to protect land owners against intruders, &c., are not amendable *as pleadings*, under the amendment Act of 1854. *Perry vs. Martin,* - - - 436

8. A motion to amend, made after nonsuit awarded, but not entered, is in time. *Phillips et al. vs. Brigham, Kelly & Co.,* - - - - - 617

See *Appeal Bond,* 1.

See *Attachment and Garnishment,* 4.

APPEAL AND APPEAL BOND.

1. An appeal bond signed by one of several defendants, against whom the verdict appealed from was rendered, the other defendants and no one else signing as his security, is not even an attempt to comply with the statute, and is neither good as an appeal bond, nor can it be amended. *Gordon et al. vs. Robinson,* 410

2. A Deputy Clerk is authorized, in virtue of his appointment, to administer to a party applying for an appeal, an oath that he is unable from his poverty to pay costs and give security for the eventual condemnation money. *Graves et al. vs. Warner,* 620

See *Landlord and Tenant.*

ARBITRATION AND AWARD.

1. When the submission is to three arbitrators, an award by two, is not valid. *Smith et al. vs. Walden, Guar. et al.,* - - - - - 249

2. The arbitrators in a case were to have the powers and authority of arbitrators under the arbitration Act of 1856.
Held, That they had power to examine a party to the arbitration, as a witness for himself. *Golden vs. Fowler,* - - - - - - 451

ATTORNEY GENERAL.

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ATTACHMENT AND GARNISHMENT.

1. The salaries of the officers of municipal corporations, under $500, are not subject to garnishment, by the laws of this State. *Holt vs. Experience,* - 113
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See *Crim. Law*, 16.

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BANKS AND BANKING.

1. That the bills of a bank are below par does not make their circulation illegal. *Robison vs. Beall*, - 17

2. Though the holder of the bills of a bank obtains them at a discount, he may collect them in full. *Ib.*

3. It is no defence to the parties to a note, when sued by the holder, that he has made a champertous agreement in reference to the note, with the attorney bringing the suit. *Ib.*

BILL OF EXCEPTIONS.

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1. If a common carrier fail to deliver goods according to contract, and they are lost, he is liable for the value of the goods, at the place of destination at which he engaged to deliver them, deducting the freight. *Taylor & Co. vs. Collier*, - - - - - 122

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See *Amendment*, 5.

CHARGE OF THE COURT.

1. In a motion for a new trial, if the *rule nisi* states the charge differently from the charge itself, as written out by the Judge, and sent up with the record, this Court will be governed by the charge as written. *Alston vs. Grantham*, - - - - 374

2. If the law is charged as requested by counsel, it is not error in the Court to omit charging something in addition, to which its attention is not called by counsel. *Ib.*

3. It is no error in the Court, to refuse a request not authorized by the evidence. *Doonan vs. Mitchell*, 472

4. A request to charge the jury upon detached parts of the evidence, in order to show a want of jurisdiction in the Court, omitting a part which shows that the Court had jurisdiction, ought not to be given to the jury. But a solicitation to commit an offence is an act towards its commission. *Griffin vs. The State*, - 493

5. A testator appointed two of his sons, trustees of certain property including a number of negroes, for his daughter, a married woman, for her life, with remainder to her children. All of this property, except one old negro woman, the trustees turned over to the daughter and her husband, according to the trust. The old woman was almost worthless from age. Her relations belonged to one of the trustees, and he retained her, merely that she might be with them, doing so, however, against the wishes of the daughter and her husband, between whom and himself and the other trustees, there had grown up an estrangement amounting to social non-intercourse. The daughter and husband asked, by bill, that the trustees might be removed. The Court charged the jury that these causes were not sufficient to authorize an order of removal.

Held, That the charge was right. *Parsons et ux et al. vs. Jones, trustee*, - - - - 644

6. The Court was requested to charge, that if the testator "might have seen" the attestation, it is sufficient; that "it is not necessary, that he should actually have seen the attestation." The Court refused to give this charge, but said, "if the attestation be in the same room, this is the law; otherwise, it is not."

Held, That the Court erred in not giving the request in charge, there being evidence to authorize the request. *Lamb vs. Girtman et al.*, - - - 625

7. Whether a pistol is loaded with *ball*, is not an issuable fact on the trial of a prisoner on the statute for the offence of shooting at another, and it is not error for the Court to refuse to charge the jury, without such proof they cannot convict. *Johnson vs. The State*, - - - - - - - 611

8. To refuse to give a request of counsel in charge to the jury, which is not authorized by the law or facts of the particular case, is not error. *Ib.*

CITY COUNCIL OF AUGUSTA.

The City Council of Augusta, imposed a tax on the banking part of the capital of the Georgia Railroad and Banking Company, and a tax on the real estate of the company, situated in Augusta. The charter of the company, contains a provision in these words. "The stock of the said company and its branches, shall be exempt from taxation for and during the term of seven years, from and after the completion of the said Railroads or any of them; and after that, shall be subject to a tax, not exceeding one-half per cent. per annum, on the net proceeds of their investments."

Held, That the taxes were illegal. *The City Council of Augusta vs. The Georgia Railroad and Banking Company*, - - - - - - 651

CITY COUNCIL OF SAVANNAH.

The members of the fire company of Savannah, all resigned, and in their places, the City Council appointed new members.

Held, That the City Council had the power to make the appointments. *Miller et al. vs. The Savannah Fire Company*, - - - - - - 678

COLOR OF TITLE.

A Sheriff's deed is admissible as color of title even in the absence of the *fi. fa.* *Sutton vs. McLoud*, 638

COMMITMENT.

See *Prison Bounds Bond,* 1, 2.

CONSIDERATION, FAILURE OF

See *Promissory Notes,* 4.

CONSTITUTIONAL LAW.

See *Pleading,* 3.

CONTINUANCE.

It is no ground for continuing a cause, that one of the jury, after he was taken to try a cause, was discovered to be incompetent. *Hook vs. Stovall, Dunn & Co.* 704

See *Crim. Law,* 3, 6, 13.

CONTRACT.

A contract for the sale of land will not be set aside by the mere false assertion of the vendor as to the productiveness of the property, especially where no recision had been applied for. *Collier vs. Harkness,* - 362

CRIMINAL LAW.

1. On the trial of an indictment for murder. the jury differed among themselves as to what a witness swore on a material point.

Held, That the witness, if at hand, ought to have been made to restate his evidence on the point; if not at hand, that what had been taken down by the Court in writing as his evidence on the point, ought to have been read to the jury. *Dozier vs. The State.* - 156

2. A demand to entitle the accused to a discharge under the 18th section of the 14th division of the Penal Code, must be made, not later than the second Term after the indictment is found. *Watts vs. The State,* 231

3. The State may continue a criminal cause without being compelled to make a showing. *Ib.*

4. When and under what circumstances a mistrial will be declared, is a question, pretty much in the discretion of the Court. *Avery vs. The State,* - 233

5. A new trial will not be ordered, upon the ground of newly discovered evidence, when the party has been guilty of gross *laches* in not having obtained it on the trial of the case. Nor where if introduced, it could not possibly change the verdict. *Ib.*

6. First: A continuance will not be granted in a criminal case, on account of the excited state of the public mind, after five months have elapsed since the crime was committed. Second: Continuances are still within the sound discretion of the Court, and do not fall under the New Trial Act of 1853. Third: Where the accused has ample time after his arrest, to make preparation for his trial, the *recent* finding of the bill of indictment by the grand jury, is no excuse for postponing the cause; especially, where the offence for which the prisoner is to be prosecuted is well known to him—the only question being as to the grade of the homicide which he has committed. Fourth: The fact that the defendant is imprisoned, is no reason why he should not make preparation for his defence. Fifth: If it appear to the Court that the testimony of an absent witness is immaterial, a continuance will not be granted. *Revel vs. The State.* - - 275

7. Where the prisoner, after killing the deceased, effects his escape, and to enable him to do so, takes the life of another person, and attempts to shoot others, these acts of violence may be given in evidence on the trial for murder, as well to manifest the deep self-consciousness of the accused of his guilt, as to characterize the *quo animo* with which the deed was perpetrated. *Ib.*

8. To constitute murder, it is not necessary that the prisoner should entertain personal ill-will toward the deceased. *Ib.*

9. A verdict is not objectionable for irregularity, for finding the defendant guilty of murder, instead of guilty generally. *Ib.*

10. The jury being made the judges both of the law and the facts in criminal cases, their verdict will not be disturbed unless it be clear that the defendant has been wrongfully convicted. *Ib.*

11. If the jail of the county, where a conviction is had in a criminal case, is insecure, it is competent for the Court to order the prisoner to be committed to the jail of another county for safe keeping. *Ib.*

12. The taking the impression of the key which unlocks the door of a store-house, for the purpose of making or procuring a false key, with the intent of entering the house and stealing therefrom, is an attempt to commit larceny from the house, by the person taking the impression of the key, whether he intended to enter and steal, himself, or to procure another to do it. *Griffin vs. The State*, - 493

13. If a motion be made to continue a cause on the ground of the absence of a witness, it must be shown that his evidence will be material on the trial of the cause; that the party cannot go safely to trial without such evidence; and in case of suspicion, the Court should look closely into the circumstances, and may consider what has passed before it in the progress of the cause, to determine on the merits of the application. *Griffin vs. The State*, - - - 493

14. If a person commit an act in the county where an offence, if perpetrated, must be committed towards the commission of that offence, he may be tried and convicted in that county, and he may be convicted whether he intended to commit the offence, or procure another to do it. *Ib.*

15. If a person be indicted for an attempt to commit a crime, by using persuasions and offering bribes to another to induce him to perpetrate it, the offence of "attempt" is complete in the county where the offence, if perpetrated, must have been committed, whether the person who used the persuasions or offered the bribes was in the county at the time or not. *Ib.*

16. A defendant pleading former acquittal, must show a record of acquittal. If on an indictment for murder, the defendant excepts to the judgment of the Court, and obtains a new trial, on a verdict of guilty of manslaughter, the whole record of acquittal is set aside, and there is nothing to support the inference of acquittal of murder. *Bailey vs. The State*, - 579

17. The plea of not guilty, is a waiver of the copy of the indictment, and of the list of the witnesses sworn before the grand jury. *Cook vs. The State*, - 593

18. If an indictment contains two counts varying the

charges against the defendant for the commission of the same act, when, on the conviction of the defendant on either, the grade of punishment *may* be the same, the Attorney General cannot be compelled to elect on which count he will put him on trial. *Johnson vs. The State*, - - - - 611

19. An indictment for selling liquor to a slave, alleged that it was the second offence.
Held, That this was an allegation for the jury and not for the Court. *Hines vs. The State*, - - 614

20. It is sufficient, if the offence be stated in the language of the code. *Ib.*

DAMAGES.

1. If unsound property is of any value either at the time of sale or afterwards, the purchase money with interest is not the proper criterion of damages. *Tillman vs. Stringer*, - - - - 171

2. Any liquidation of the damages to be paid, for the mere non-payment of money must, of necessity, be in violation of the law fixing the interest to be paid, for the use, or the detention of money; that liquidation excepted, by which the sum to be paid would be not greater, than the sum which would be to be paid by this law. *Clark, Austin & Smith vs. Kay*, - 403

3. The jury may find a larger amount of damages in an action of trover than those specifically alleged as the value of the property sued for, provided they do not exceed the amount alleged in the conclusion of the declaration. *Terrell, adm'r, vs. McKinny et ux.* 447

4. If in defence of a note given for a negro warranted to be sound, the maker pleads her unsoundness at the time of the sale as a failure or partial failure of con-

DEPUTY CLERK.

See *Appeal Bond*, 2.

DISTRIBUTION OF ASSETS.

See *Adm'rs and Ex'ors*, 2.

See *Equity*, 2.

See *Presumption*, 2.

EJECTMENT.

See *Amendment*, 2.

ESCHEAT.

A grant was issued to L. B in 1788. Subsequently, nothing was heard of him, or of any heir of his, or of any will made by him.

Held, That by 1854, it was to be presumed, that he was dead, and, that the land had escheated to the State, on due inquest; and further *held*, that if this inquest was one happening before the Escheat Act of 1801, the land was subject, at any time after the inquest, to be regranted by the State, under the Head Rights laws; if one happening after that Act, the land was not so subject, that Act requiring the escheator, to sell and convey the land himself. *Vickery vs. Benson*, 582

EQUITY.

1. It is no ground for relief in a Court of Equity, that the vendee of real estate has got worsted in the contract. He must have been defrauded, and that, too, after using reasonable precaution on his part to guard against imposition. *Collier vs. Harkness et al.* 362

2. The *bona fides* of a conveyance made by an intestate to his infant son, may be enquired into in a bill to marshal assets. *Coleman & Quillian vs. Franklin*, 368

3. And it may be enquired into in a county in which the land conveyed does not lie—that county having jurisdiction of the parties. *Ib.*

4. What is a mistake on one side, and a fraud on the other, is as much the subject of correction, as if it were a mistake on both sides. *Wyche et al. vs. Greene,* 415

5. Equity readily receives the "excuses of the mortgagor; not only for the purpose of giving him time to procure the money previously to the foreclosure, but also for the purpose of opening the foreclosure." *Golden vs. Fowler,* - - - - - 451

See *Evidence,* 26.

See *Ne exeat.*

EQUITY, PLEADINGS AND PRACTICE.

1. Where money is admitted by a defendant in equity to a creditor's bill, to be in his hands, belonging to the estate of a debtor, it will be directed to be paid into Court and there kept or ordered to be vested, as the Court may judge best. *Rutherford, rec'vr. vs. Jones et al.* - - - - - 150

2. A writ of error, to reverse a judgment, directing pleadings to be amended or a defendant in equity to answer over, is not entitled to much favor. *Cleghorn vs. Rutherford, rec'vr,* - - - - 152

3. Where the answer of a defendant in equity is not full and complete, and that too, to the best of his knowledge, information and belief, he should be required to answer over. *Ib.*

4. The defendant having appeared and answered the bill, and litigated it for five years, an application to

legatee in respect to the property bequeathed to him. *Ib.*

See *Charge of the Court*, 6.

WRIT OF ERROR.

The parties to a controversy, agreed to submit it to the decision of the Judge, and to let him fix the fees of their counsel, with the right to the counsel, to except to his decision, and bring it before the Supreme Court. The counsel submitted their claims for fees, to the Judge, and he fixed the amount of their fees. To his decision, a portion of the parties to the submission filed a writ of error, but failed to make the counsel parties to the writ.

Held, That the counsel were necessary parties to the writ; and for want of them, the writ was dismissed on motion. *Barksdale et al. vs. Bunkley, Harvey et al.* 39